18-516

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 97.

THE UNION PACIFIC RAILWAY COMPANY, APPELLANT,

vs.

ANDREW RYAN, MARSHAL OF THE CITY OF CHEYENNE, AND THE CITY OF CHEYENNE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF WYOMING.

FILED OCTOBER 14, 1881.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 Be it remembered that heretofore, to wit, that on the 18th day of February, A. D. 1881, there was filed in the clerk's office of the supreme court of Wyoming Territory a transcript in the words and figures following, to wit:

Bill of Complaint.

TERRITORY OF WYOMING, }
County of Laramie, } *ss:*

In the District Court, First Judicial District. In Chancery.

THE UNION PACIFIC RAILWAY COMPANY, Complainant,
vs.
ANDREW RYAN, Marshal of the City of Cheyenne, and THE CITY OF CHEYENNE, Defendants

To the Honorable William Ware Peck, associate justice of the supreme court of Wyoming Territory and presiding judge of said district court:

Humbly complaining, sheweth unto your honor, your orator, The Union Pacific Railway Company, a corporation created and organized under the laws of the United States, and a citizen
2 of the State of Massachusetts, having its principal place of business therein; that by an act of the Congress of the United States, entitled "An act to aid in the construction of the railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military, and other purposes," approved July 1st, 1862, and an act amendatory thereof, entitled "An act to amend an act entitled An act to aid in the construction of a railroad and telegragh line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military, and other purposes," approved July first, eighteen hundred and sixty-two, which last-named act was approved July 2d, 1864, your orator was created a corporation by the name of The Union Pacific Railroad Company; that by authority of the said acts of Congress, on the 24th day of January, 1880, the said Union Pacific Railroad Company was consolidated with a corporation known as the Kansas Pacific Railroad Company, and a corporation known as the Denver Pacific Railway and Telegraph Company, under the said name of The Union
3 Pacific Railway Company, which said consolidated company became possessed of all the property and franchises and rights of the said several companies.

And your orator further sheweth unto your honor, that in and by said act of Congress, and other acts of Congress amendatory thereof and supplemental thereto, your orator was authorized to construct a railroad and telegraph line from a point on the western boundary of the State of Iowa, to be fixed by the President of the United States, westward through the Territories of the United States to the eastern boundary of the State of California, or to where it would meet or unite with the Central Pacific Railroad, being and about to be constructed eastward from the State of California. That such

point having been fixed by the President of the United States on the western boundary of the State of Iowa, opposite to the city of Omaha, in the State of Nebraska, the said railroad company, under and by its said former name, between the years A. D. 1864 and A. D. 1869 inclusive, proceeded to, and did, build and construct
4 a railroad and telegraph line from the city of Omaha aforesaid westward through the Territories of the United States for more than one thousand miles, and until it met and united with said Central Pacific Railroad, and equipped said railroad, and has ever since operated the same, as well as the said telegraph line. That the said railroad and telegraph line were so constructed, and have ever since been operated as and in accordance with the said laws of the United States, and the same were duly accepted by the Government of the United States.

And your orator further sheweth unto your honor that the construction of said railroad and telegraph line was convenient and necessary to the due and proper carrying on of the operations of the Government of the United States, and one of the principal purposes sought to be, and which was in fact, attained by the incorporation of said company and the construction of said railroad and telegraph line, was to secure the safe and speedy transporta-
5 tion of the mails, troops, and munitions of war, and public stores of the United States through remote regions of country then unsettled, uninhabited, and accessible only with great difficulty and expense, and wherein there were no facilities or means for accomplishing said purposes, to transmit dispatches upon public business of the United States, and otherwise facilitate and promote the operations and ends of the said Government, for all which purposes the said railroad and telegraph line have been and are now continually used and operated.

And your orator further sheweth unto your honor that the said railroad and telegraph line runs through the Territory of Wyoming and through the city of Cheyenne, in Laramie county, in said Wyoming Territory, for a distance of two and two-tenth miles, and that your orator also owns within said city of Cheyenne a branch railroad track of the length of one mile, and another railroad track, formerly the property of the Denver Pacific Railway and Telegraph Company, of the length of one-half a mile.

And your orator further sheweth unto your honor that the
6 said city of Cheyenne is a municipal corporation, created under and by virtue of an act of the Territorial Legislature of said Wyoming Territory, entitled "An act to incorporate the city of Cheyenne," and the powers of said city of Cheyenne are enumerated and defined by said act last named and the acts of the Legislature of Wyoming Territory amendatory thereof and supplemental thereto, and your orator prays that the said the city of Cheyenne may be taken as a party defendant hereto.

And your orator further shows unto your honor that it made due return to the city clerk of said city of Cheyenne as the person empowered and authorized to make the annual assessment of property in said city of Cheyenne for the year A. D. 1880 of its property,

situate and subject to assessment in said city of Cheyenne, which return included all of your orator's property in said city subject to assessment and taxation for the municipal purposes of said city, except the road-bed superstructure, right of way, and all structures situated thereon, rolling stock, side track, telegraph lines, furniture, and fixtures and personal property belonging to your orator,
7 which said return of your orator embraced a large amount of real estate and improvements thereon belonging to your orator within the corporate limits of the said city.

And your orator further alleges that one John K. Jeffrey, who was and is the city clerk of said city of Cheyenne, not acting as said city clerk, but pretending to be, and acting as assessor of said city, unlawfully and wrongfully did undertake to assess your orators, road-bed, right of way, all structures situated thereon, and superstructures on road-bed, rolling stock, side track, telegraph line, furniture fixtures, and personal property belonging to your orator, for the purposes of said city for the year A. D. 1880, which said pretended assessment, as made by said Jno. K. Jeffreys, as assessor of said city, was as follows: 4 miles main track, road-bed, &c. (main line,) $8,000 per mile, $32,000; 4 miles of side-track, $4,500 per mile, $18,000; 1 R. R. hotel, $10,000; 1 passenger
8 depot and appurtenances, $12,000; 1 freight depot & appurtenances, $12,000; 1 round-house and appurtenances, $25,000; 6 dwelling-houses, (frame,) $3,000; 1 express office and furniture, $1,000; water and wood depot and appurtenances, $2,000; telegraph poles, $1,000; 1 mile road to military depot, $1,500; proportionate value of rolling stock in Cheyenne as terminus, $100,000. And your orator further sheweth unto your honor that the said Jno. K. Jeffrey did also unlawfully, wrongfully, and without jurisdiction undertake to assess for the year 1880, as the assessor of the said city, and not as city clerk, other property of your orator, to wit, as follows: (Brick,) 1 freight depot and office, $1,200; (wood,) 1 passenger depot, $800; frame building on main track, U. P., $200; main track, ½ mile, @ $500, $2,500; rolling stock, proportional value in Cheyenne, as terminus, $10,000, which said last-named property was formerly the property of the Denver Pacific Railway and Telegraph Company.

And your orator further sheweth unto your honor that all of the property so pretended to be assessed by the said Jno. K. Jeffrey, as city assessor of said city for the year A. D. 1880, constitutes the road-
9 bed, superstructure, right of way, and structure thereon, rolling stock, side track, and telegraph line of your orator's railroads and telegraph line, and was subject to assessment for taxation in and for the purposes of said city of Cheyenne for the year, A. D. 1880, by the territorial board of assessment of Wyoming Territory, by virtue of an act of the Legislature of said Territory, entitled "An act in relation to the assessment of railways and telegraph lines," approved December 13th, 1879, and was and is assessable for the purposes of taxation by said city of Cheyenne only by said territorial board, as your orater believes. And your orator further alleges that the said Jno. K. Jeffrey, having made said pretended assessment of

your orator's said property as aforesaid, he did return the same to the city council of said city of Cheyenne verified by his oath as assessor of said city of Cheyenne as to correctness of his said assessment. And your orator alleges that, as it verily believes, the
10 said Jno. K. Jeffrey had no jurisdiction to make said assessment of your orator's said property, or any part thereof, and that his acts in doing so were null, nugatory, and void and fraudulent.

And your orator further alleges that said assessment or pretended assessment having been returned to said city council as aforesaid, the said city council did unlawfully, wrongfully, and fraudulently pretend to correct and equalize the said assessment as returned to it by said Jno. K. Jeffrey, so that the same as equalized and corrected by said city council was and is as follows: 2 miles main track, roadbed, &c., main line, $8,000 per mile, $16,000; 6 miles side track, $5,500 per mile, $33,000; rolling stock, proportional value, used on Colorado Central Railroad, $7,500; leaving all other items in the said assessment and return of the said Jno. K. Jeffrey to stand the same as returned by him to the said city council; and did also unlawfully, wrongfully, and fraudulently pretend to correct and equalize the said
11 assessment, as returned by said Jno. K. Jeffrey as aforesaid, of the property formerly belonging to the said Denver Pacific Railway and Telegraph Company, so that the same so equalized and corrected was and is as follows: (Wood) 1 passenger depot, $600; rolling stock, proportional value, in Cheyenne terminus, $17,000, leaving all other items of said last-named assessment and return of the said Jno. K. Jeffrey to stand the same as returned by him to the said city council.

And your orator further sheweth unto your honor that said pretended assessment of your orator's said property having been made, returned, corrected, and equalized as aforesaid, and confirmed by the said city council, the said city council did, by an ordinance passed and approved on the 8th day of June, A. D. 1880, entitled "An ordinance levying taxes for the year 1880," levy the following taxes upon the real and personal estate of the city of Cheyenne, according to the assessed value thereof, to wit: Six mills on the
12 dollar for the general revenue purposes of the city not otherwise specially provided for; two mills on the dollar for improvements on the streets and avenues, including the opening, widening, and grading thereof, and for building bridges, culverts, and sewers, and foot-walks across streets, not otherwise provided for; three and one-half mills on the dollar for the payment of the interest upon and redemption of one-tenth of the bonds issued April 10th, A. D. 1878.

And your orator further alleges and shows unto your honor that the said pretended assessments of your orator's said property were and are grossly unfair, unjust, and unequal, both as returned by said Jeffrey and as corrected by said city council; that the values as placed upon large portions of said property above enumerated is much higher than the values placed upon the property of other

persons and corporations assessed in said city of Cheyenne for the year A. D. 1880.

And your orator believes, and so alleges the fact to be, that
13 said assessments of your orators said property were fraudulently made as above set forth, and with the fraudulent purpose and intent on the part of the authorities of the said city to make your orator pay an unjust and undue proportion of the taxes collected in the said city. And that said authorities did not value and assess said property upon any proper evidence warranting such valuation, and that said authorities were influenced in so doing by a feeling of prejudice and hostility towards your orator.

And your orator alleges that at the time said pretended assessments and correction and equalization thereof were made your orator was not assessable for any proportional value of rolling stock used on the said Colorado Central railroad; that the said Colorado Central railroad then was, and now is, owned by a corporation organized under the laws of Wyoming, known as the Colorado Central Railroad Company in Wyoming; that the said Colorado Central
14 railroad does not extend into any part of the corporate limits of the city of Cheyenne, and never did; and the said city council had no authority to make said assessment of $7,500 against your orator for any rolling stock of said Colorado Central railroad.

And your orator further alleges that the valuations placed upon your orator's said property by the aforesaid proceedings of the said Jno. K. Jeffrey pretended to act as assessor as aforesaid, and the said city council are exorbitant and unfair in the following particulars, to wit: That the road bed of your orators' railroad is assessed at $8,000 per mile, whereas, as your orator alleges, that the assessable value of the same, if valued in proportion with other property in Cheyenne, would not be more than $6,000 per mile, as your orator believes; that the said tracks of your orator are assessed at $5,500 per mile, whereas, your orator alleges that the assessable value thereof, if valued and assessed in proportion with other property in the city of
15 Cheyenne, would not be more than $2,000 per mile; that the said round-house is assessed at $25,000, whereas your orator alleges that the same is not worth more than $15,000, and can now be built, and could be built when said assessment proceedings were had and taken, new, for $15,000; that your orator is assessed $100,000 for rolling-stock in Cheyenne, whereas your orator alleges that the proportional value of your orator's rolling-stock belonging within or justly apportionable to that part of your orator's railroads in Cheyenne city, aforesaid, is much less than the value thereof as assessed as aforesaid.

And your orator further alleges that said assessments, corrections, equalization, and confirmation having been made as aforesaid, the said Jno. K. Jeffrey, being then and now the city clerk of the said the city of Cheyenne, as such did immediately after the passage of said ordinance levying said taxes make out a tax list in tabu-
16 lar form, which list included your orator's name, and did enter thereon against your orator's name the lands assessed to your orater in one column of said list, and their value, and in another column of said list did also enter against the name of your

orator the total valuation of the personal property assessed to your orator, as aforesaid, and did extend on the said list against your orator the following taxes, to wit: Union Pacific Railway Company, (Union division,) on lots and lands, general revenue tax, $132.30; city bond tax, $77.18; street and alley tax, $44.10; making a total tax claimed from your orator on lots and lands of $253.58. On personal property, general revenue tax, $1,199.40; city bond tax, $699.65; street and alley tax, $399.80; making a total tax claimed from your orator on the assessment of its personal property, Union division, of $2,298.85; Union Pacific Railway Company (for Colorado Central Railroad Company), general revenue tax, $45.00; city bond tax, $26.25; street and alley tax, $15.00; making a total tax claimed from your orator on account of said assessment of rolling-stock of the
17 said Colorado Central Railroad Company, in Wyoming, of $86\frac{25}{100}$; Union Pacific Railway Company (Kansas division), general revenue tax, $130.15; city bond tax, $75.93; street and alley tax, $43.38; making a total of taxes claimed from your orator, on account of the said Kansas division of its property in Cheyenne, of $249.46, and making a grand total of taxes claimed from your orator by the said city of Cheyenne for the year 1880, on account of all the divisions of its railroads in the said city of Cheyenne, and on account of all its property within said city, of $2,888.14, including the said sum of $86.25, claimed on account of said assessment of rolling-stock of the said Colorado Central Railroad Company, in Wyoming, as shown by said tax list.

And your orator further alleges that said city clerk, having made out said tax list as aforesaid, did attach thereto a certificate by himself under the corporate seal of said city, showing the nature
18 of said tax list and the year it was for, and that the description of property assessed and values thereof contained therein — said list were correct, as appeared upon the assessment roll for said year; and that the said list contained the correct amount of the several taxes as levied by the city council; and did also attach to the said list a warrant under his hand and said corporate seal directed to the collector of the said city, requiring him to collect the taxes therein levied according to law, and return the same within 90 days after the date of said warrant, which said warrant was dated on the 22d day of June, A. D. 1880.

And the said city clerk did, on the date last aforesaid, deliver the said tax list of said city to Andrew Ryan, marshal of the city of Cheyenne aforesaid, whom your orator prays may be taken as a party defendant to this your orator's bill of complaint.

And your orator further alleges that all of the aforesaid pro-
19 ceedings in relation to the assessment of your orator's property and the correction and equalization thereof, and the making out and authenticating of said tax list and attaching said warrant thereto, and the delivery of the same to the said Ryan, and the confirmation of the said assessment roll, and the levy of the said taxes by ordinance, as aforesaid, were had and taken under and by virtue of an ordinance or pretended ordinance of said city of Cheyenne, entitled "An ordinance concerning the assessment,

levying, and collection of taxes," passed and approved on March 2d, 1880, by the city council of said city of Cheyenne and the mayor thereof, to which your orator craves reference may be had for greater certainty.

And your orator further alleges that it has paid to the marshall, as the collector of the taxes of the said city of Cheyenne, for the year A. D. 1880, all taxes which are justly and equitably due to said
20 city of Cheyenne from your orator; that on the 16th day of September, A. D. 1880, your orator paid to said Andrew Ryan, marshall, as aforesaid, the sum of $253.58, being the full amount of taxes claimed by said city from your orator for the year 1880, upon its city lots and lands within said city, and that on the same date your orator did pay to the said Andrew Ryan, marshall, as aforesaid, the further sum of $363.40 as the amount of taxes which your orator claims is justly and equitably due to the said city of Cheyenne from your orator for the year A. D. 1880, upon a just and lawful assessment of your orator's road-bed, superstructure, right of way, and all structures thereon, rolling-stock, side track, telegraph lines, furniture and fixtures, and personal property belonging to your orator, for which said several sums of money your orator did receive from, and now holds, the receipts of the said Andrew Ryan, the tax collector of said city of Cheyenne.

And your orator further alleges that the Territorial assessment
21 board of the Territory of Wyoming, acting under and pursuant to said act of the Legislature of Wyoming Territory, did assess your orator's said railroads, including the road-bed, superstructure, right of away, and all structures thereon situated, rolling-stock, side tracks, telegraph lines, furniture and fixtures, and personal property belonging to said corporation, your orator, for the year 1880, at the rate of $9,250 per mile; that your orator's railroad, in said city of Cheyenne, at said valuation, should have been assessed for taxation by said city at the sum of $29,600, and your orator's other property in said city, not including its real estate, was assessed at the sum of $2,000, making the total valuation of your orator's said property in said city, when properly assessed, $31,600.

And your orator alleges that the said sum of $363.40, paid to said Ryan, as aforesaid, constitutes the full amount of the tax justly due from your orator to the said city of Cheyenne for the year 1880, exclusive of the tax due on lots and agricultural lands ouside
22 of the right of way of your orator's said railroads in said city of Cheyenne.

And your orators further alleges that the said Andrew Ryan, marshal, as aforesaid, threatens that if your orator does not immediately pay to him the full amount of the said taxes claimed by the said city of Cheyenne for the year 1880, being the full amount of $2,888.14, less the amounts already paid him, as aforesaid, he will proceed to enforce payment thereof by virtue of said tax list and warrant attached thereto, and will seize and sell your orator's property in said city of Cheyenne, whether the same be real or personal as may be most convenient and best calculated to compel your orator to pay said illegal exactions.

And your orator believes, and so charges the fact to be, that the said Ryan, by virtue of said tax list and warrant, will proceed to levy upon and seize some of your orator's engines or cars, being a part of the rolling-stock of your orator on the said railroad, and necessary to the operation of said railroad, to compel the
23 payment of the part of said taxes claimed, as aforesaid, and unpaid, unless he, the said Ryan, marshal, as aforesaid, is restrained by the process of this court.

And your orator alleges that such threatened action on the part of said Ryan would cause irreparable injury to your orator, for that said property would not bring a fair market price in the place where the same would have to be sold, and for that such action by said Ryan would tend to prevent your orator from the full enjoyment of its franchise as derived from the said acts of Congress, and would tend to prevent your orator from executing its obligations to the Government of the United States, and because under the law of Wyoming Territory the said tax so assessed and levied against your orator and claimed by your orator to be unjust is made a lien upon the real property of your orator in said city of Cheyenne, and
24 thus cast a cloud upon the title to any real property owned by your orator in said city of Cheyenne.

And your orator further shews unto your honor and alleges that beside its said road-bed, right of way, and permanent improvements thereon it has and owns within the city of Cheyenne a large amount of real estate which has been laid out by your orator into blocks and lots, and which it is now engaged in selling in the market, and that the said illegal taxes levied and assessed as aforesaid, and still unpaid by your orator, constitute by the law of said Territory a lien upon said lots and blocks of real estate, and thus cast a cloud upon the title thereof, and depreciates the value thereof, and prevents your orator from realizing a just and fair market value for said lots and blocks, for which reason your orators sustains irreparable injury by reason of said levy and assessment of taxes standing upon the assessment roll and tax list of said city of
25 Cheyenne.

And your orator further alleges that it has no adequate remedy at law for the threatened enforcement of the collection of said illegal taxes, for that if compelled to pay the same and recover the same back by ordinary legal action, inasmuch as it owns a considerable portion of the entire property in said city of Cheyenne subject to assessment by said city for the taxes of said city, and as any judgment obtained against said city for such illegal taxes paid would have to be raised and paid by means of a tax collected from all the taxable property in said city. Your orator, if compelled to resort to that means of relief, would thereby be compelled to pay a large portion of its own judgment against said city of Cheyenne.

And your orator further alleges that the Kansas Division of the Union Pacific Railway Company embraces the property form-
26 erly belonging to the said Denver Pacific Railway and Telegraph Company, and that the Union Division of the said

Union Pacific Railway Company embraces the property formerly belonging to the said Union Pacific Railroad Company.

And your orator further alleges that it is ready and willing, and hereby offers to do equity in the premises, and hereby offers to pay to the said city of Cheyenne as your honor may order and direct, and upon such terms as your honor may direct, all such taxes or such sums of money as your honor may upon a hearing of this cause believe and decree to be lawfully, justly, and equitably due to the said city of Cheyenne from your orator for the year A. D. 1880.

And your orator further alleges and shows unto your honor that it is compelled to seek the interposition of a court of equity to prevent the seizure and sale of its property upon the pretended and illegal exactions above set forth to avoid being involved in a
27 multiplicity of suits with the said defendants and with the various purchasers of its said lots in the said city of Cheyenne, and to avoid having the title to its said real estate clouded by said lien or apparent lien, and to avoid having its franchises impaired and injured by said illegal exactions claimed from it by said defendants.

And your orator further alleges that it has requested the said defendants to refrain from their threatened declarations to proceed by summary process to collect said illegal exaction, but they have refused to comply with such requests.

And your orator is informed and believes, and so charges the fact to be, that said defendants will, unless restrained by the process of this court, at once proceed to put their said threats into execution.

And your orator well hoped that no disputes would have arisen touching the said claims for taxes from your orator, but that
28 the said defendants would have complied with the reasonable request of your orator, as in conscience and equity they ought to have done.

But now, so it is, may it please your honor, that the said Andrew Ryan and the said City of Cheyenne, combining and confederating with divers persons, at present unknown to your orator, whose names, when discovered, your orator prays he may be at liberty to insert herein, with apt words, to charge them as parties defendant hereto, and contriving now to wrong and injure your orator in the premises, they, the said Andrew Ryan and the said The City of Cheyenne, absolutely refuse to comply with such request, and they at times pretend that the said city taxes claimed from your orator are justly due from your orator, and at other times they allege and pretend that your orator is bound to pay all of said taxes, whether they are justly due from your orator or not; whereas your orator charges the contrary thereof to be true, and that said taxes are not justly due from your orator, and that your orator is not
29 bound to pay said taxes, whether they are justly due from your orator or not, and that your orator, if compelled to pay said taxes, would not have an adequate remedy at law, and would become involved in a multiplicity of suits by reason thereof, and

that the said taxes cast a cloud upon the title of your orator's real estate and property in the said city of Cheyenne.

All of which actings, doings, and pretenses of the said defendants are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orator in the premises.

In consideration whereof, and forasmuch as your orator is entirely remediless in the premises, according to the strict rules of the common law, and can only have relief in a court of equity, where matters of this nature are properly relievable and cognizable.

To the end, therefore, that the said Andrew Ryan, marshal of the said city of Cheyenne, and the said The City of Cheyenne, and the rest of the confederates, when discovered, may full, true, direct, and perfect answer make to all and singular the matters hereinbefore stated and charged, as fully and particularly as if the same were hereinafter repeated and they thereunto distinctly interrogated; and that not only as to the best of their respective knowledge and remembrance, but also as to the best of their several and respective information, hearsay, and belief, and that the said taxes claimed from your orator as due to the said The City of Cheyenne may be adjudged and decreed to be null and void, and that the said assessment of your orator's railroad, right of way, and improvements thereon, and rolling-stock within the said city of Cheyenne and the said levy of taxes upon said assessment may be adjudged and decreed to be null and void, and that said assessment and levy may be decreed to be cancelled, and that it may be decreed and adjudged that all of your orator's property in the said city of Cheyenne may be decreed to be freed and discharged of and from the lien or apparent lien of said taxes so as aforesaid claimed from your orator; and that the said defendants and their successors in office may be at once restrained by the temporary restraining order and injunction of this honorable court from proceeding to collect said unpaid taxes or any part thereof by distraint, seizure, or sale of your orator's property or otherwise, and that upon the final hearing of this cause the said defendants may be forever restrained and enjoined from proceeding in any manner to collect or to enforce the payment of said unpaid taxes, and that your orator may have such other and further —— in the premises as the nature of his case shall require and to your honor shall seem meet:

May it please your honor to grant unto your orator not only the most gracious writ or writs of injunction of the Territory of Wyoming, issuing out of and under the seal of this honorable court, to be directed to the said Andrew Ryan, marshal of the said The City of Cheyenne, and the said The City of Cheyenne, to restrain them from proceeding in any manner to collect the said unpaid taxes (said injunction to issue at once, and to be made perpetual on the final hearing of this cause), but also the most gracious writ or writs of subpœna of the Territory of Wyoming, to be directed to the said Andrew Ryan, marshal of the said The City of Cheyenne, and the said The City of Cheyenne, and the rest of the confederates, when discovered, thereby commanding them, and every of them, at a certain day and under a certain pain therein

to be specified, personally to be and appear before your honor in this honorable court, and then and there to answer all and singular in the premises, and to stand to, perform, and abide such order and decree therein as to your honor shall seem meet. And your orator shall ever pray.

W. W. CORLETT, *Solicitor for Complainant.*
THE UNION PACIFIC RAILWAY COMPANY,
Complainant.
By W. W. CORLETT, *Its Solicitor.*

33 TERRITORY OF WYOMING, } ss:
County of Laramie, }

I, W. W. Corlett, of said county, being first duly sworn, on my oath do depose and say: I am the solicitor of the Union Pacific Railway Company, the complainant named in the above and foregoing bill of complaint, in the said Territory of Wyoming, and all the facts set forth in said bill of complaint are within my personal knowledge; that I have read the said bill of complaint and know the contents thereof, and that the same is true of my own knowledge, except as to the matters which are therein stated to be on my information and belief, and as to those matters I believe it to be true.

W. W. CORLETT.

On this 18th day of September, A. D. 1880, personally appeared before the undersigned the above-named W. W. Corlett, and, being first duly sworn on his oath according to law, did depose and say: That he was the solicitor of the said The Union Pacific Railway Company, the complainant named in the above and foregoing bill of complaint, in the Territory of Wyoming, and that all the
34 facts set forth in the said bill of complaint were within his personal knowledge, and that he had read the said bill of complaint and knew the contents thereof, and that the same was true of his own knowledge, except as to the matters which are therein stated to be on information and belief, and as to those matters he believed it to be true, and he did then and there subscribe the foregoing affidavit in my presence.

[SEAL.]

J. G. PRATT,
Notary Public.

The foregoing bill of complaint is endorsed as follows: Doc. 1, No. 7. The Union Pacific Railway Company *vs.* Andrew Ryan, marshal of the city of Cheyenne, and The City of Cheyenne. Bill of complaint. Filed Sept. 18th, 1880. Wm. Ware Peck, justice supreme court. Jno. K. Jeffrey, clerk 1st dist. court, Wyo. W. W. Corlett, sol. for comp't.

Restraining Order and Notice of Hearing.

TERRITORY OF WYOMING, *First Judicial District:*

35 THE UNION PACIFIC RAILWAY COMPANY
vs.
ANDREW RYAN and THE CITY OF CHEYENNE.

Upon the verified bill of complaint in this case, let the defend-

ants show cause before me at chambers, at the court-house, on the 20th day of September, A. D. 1880, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, why the orator should not have an injunction *pendente lite* in respect to the unpaid taxes, which are stated in the bill, and such other relief as may be meet. Until further order the defendants are each enjoined from all attempt to collect any of said taxes.

Cheyenne, Sept. 18, 1880.

WILLIAM WARE PECK,
Justice of Supreme Court.

The foregoing order having been duly served and returned, as per the certificate of service endorsed thereon, it is ordered that said order stand not as a chambers order, but as an order issued under section four of the act of December 15th, 1877, entitled
36 "An act to facilitate the business of district courts."

It is further ordered that the continuance of the injunction already ordered be conditioned by the filing this day on the part of the orator, a bond to the defendants, conditioned for the payment of such damages as they shall respectively sustain, in case the injunction shall be dissolved.

Hearing adjourned to 3 p. m. of this day.

Cheyenne, September 20, 1880.

WILLIAM WARE PECK,
Presiding Judge.

SEPTEMBER 20, 1880.

The bond having been furnished as above required, the injunction is continued accordingly. Hearing on motion continued to September 21, at 10 a. m., 1880.

The foregoing order is endorsed as follows: Doc. 1. No. 7. The Union Pacific Railway Company *vs.* Andrew Ryan and The City of Cheyenne. Restraining order and notice of hearing. Filed
37 Sept 18th, 1880. Jno. K. Jeffrey, clerk.

Sheriff fees: Service, 1.00; copy, 1.00; mileage, .30; total, $2.30.

TERRITORY OF WYOMING, *County of Laramie:*

I hereby certify that I received the within order on the 18th day of September, 1880, and served the [same] in Laramie county, on the 18th day of September, 1880, by delivering to Andrew Ryan & Mr. F. E. Addams, the mayor of the city of Cheyenne, each a certified copy thereof.

GEO. A. DRAPER, *Sheriff.*

Bond for Injunction.

TERRITORY OF WYOMING, }
County of Laramie, } ss:

In the District Court, First Judicial District.

THE UNION PACIFIC RAILWAY COMPANY, Complainant,

vs.

ANDREW RYAN, Marshal of the City of Cheyenne, in Laramie County, in the Territory of Wyoming, and THE CITY OF CHEYENNE, Defendants.

Know all men by these presents, that we, The Union Pacific Railway Company, as principal, and Amasa R. Converse,
38 of Cheyenne city, in said county and Territory, as surety, are held and firmly bound unto the said Andrew Ryan, marshal of the city of Cheyenne, in Laramie county, in the Territory of Wyoming and the said The City of Cheyenne, in the penal sum of six thousand dollars, lawful money of the United States of America, to the payment of which, well and truly to be made, we, and each of us, bind ourselves, our successors, heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated, this 20th day of September, A. D. 1880.

The condition of the above obligation is such, that whereas the above-named complainant has applied to the Hon. William Ware Peck, associate justice of the supreme court of the Territory of Wyoming, for an injunction in the above-entitled cause against the said defendants and obligees in said cause to restrain the said obligees and defendants from proceeding to collect the taxes claimed
39 to be due from said complainant to the said The City of Cheyenne for the year A. D. 1880, excepting the sum of $617\frac{48}{100}$ of said taxes, which said complainant has already paid:

Now, therefore, if the said complainant will pay to the said defendant, The City of Cheyenne, the full amount of the said taxes, with all damages, penalties, costs, interests, and charges which may lawfully accrue thereon in case it shall be finally decided in said cause that said complainant was not entitled to said injunction against said unpaid taxes, then the above obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

THE UNION PACIFIC RAILWAY COMPANY. [SEAL.]

By W. W. CORLETT, *Its Solicitor.*

AMASA R. CONVERSE. [SEAL.]

TERRITORY OF WYOMING, }
County of Laramie, } ss:

I, Amasa R. Converse, of said county, being first duly sworn, on my oath do depose and say: I am a resident of said county
40 and Territory, and am the person who signed the within bond as security, and that I am worth the sum of six thousand

dollars over and above all my exemptions, debts, and liabilities, and have property in said Territory subject to execution sufficient for the payment of the amount of the within obligation.

A. R. CONVERSE.

Sworn to before me and subscribed in my presence, this 20th day of Sept., 1880.

[SEAL.] W. RICHARDSON,
Notary Public.

The above bond is endorsed as follows:

The U. P. R. W. Co. *vs.* Andrew Ryan and The City of Cheyenne. (Doc. 1, No. 7) Bond for injunction. Approved Sept. 20, 1880. William Ware Peck, presiding judge. Filed Sept. 20th, 1880. Jno. K. Jeffrey, clerk 1st dist. court Wyo.

Demurrer.

TERRITORY OF WYOMING, } *ss:*
County of Laramie, }

41 In the District Court of the First Judicial District. In Chancery.

THE UNION PACIFIC RAILWAY COMPANY, Complainant,
vs.
ANDREW RYAN, Marshal of the City of Cheyenne, and THE CITY OF CHEYENNE, Defendants.

The demurrer of Andrew Ryan, marshal of the city of Cheyenne, and The City of Cheyenne, defendants, to the bill of complaint of the Union Pacific Railway Company, the above-named complainant.

These defendants, by protestation, not confessing all or any of the matters and things in the complainant's bill of complaint contend to be true in such manner and form as the same is therein set forth and alleged, doth demur to so much of said bill as relates to the taxation of the property of the Union Pacific Railway Company embraced within the Union Division and Kansas Divison thereof, so called, and prays that the taxes claimed from said complain-
42 ant, as due to the city of Cheyenne, upon all its property, except that assessed for the Colorado Central Railroad Company, may be adjudged and decreed to be null and void.

And that the assessment of complainant's right of way and improvements thereon and rolling stock within the said city of Cheyenne and the said levy of taxes upon said assessment may be adjudged and decreed to be null and void, and that said assessment and levy may be decreed to be cancelled.

And that it may be decreed and adjudged that all of said complainant's property in the city of Cheyenne may be decreed to be free and discharged of and from the lien of said taxes assessed against said company on account of all the property of the so-called Union and Kansas Divisions, and that said defendants may be restrained

from proceeding to collect said u-paid taxes on any part thereof, except those claimed on account of the Colorado Central Railroad Company, and for cause of demurrer doth show that the complainant hath not in and by said bill made or stated such a case as
43 entitles it in a court of equity to any discovery from these defendants, or either of them, or any relief against them, or either of them, as to the matters aforesaid contained in the said bill, or any of such matters; and these defendants humbly pray the judgment of the court as to such parts of the bill as they have so demurred to as aforesaid.

And as to the residue of said bill—that is to say, all of the discovery and the rest of the relief by the said bill prayed, said residue referring and relating to the assessment and taxation of the Colorado Central Railroad Company property—these defendants do demur, and for cause of demurrer doth show that said complainant hath not in and by its said bill made or stated such a case as entitles it in a court of equity to any discovery from these defendants, or to any relief against them, or either of them, as to the matters aforesaid contained in said bill, or any of such matters; and these defendants humbly pray that the judgment of the court as to such parts
44 of the bill as they have so demurred to as aforesaid.

C. N. POTTER,
Sol'r for Defendants.

The above demurrer is endorsed as follows: Doc. 1. No. 7. In Chancery. Union Pacific Railway Company *vs.* Andrew Ryan, marshall, &c., and The City of Cheyenne. Demurrer to bill of complaint. Filed Dec. 15th, 1880. Jno. K. Jeffrey, clerk and register. C. N. Potter, sol'r for defendants.

Journal Entries.

The following are the journal entries in the within cause:

In the District Court of the First Judicial District, in and for the County of Laramie, Wyoming Territory. In Chancery. November Term, 1880.

TUESDAY, *November 30th*, 1880.

THE UNION PACIFIC RAILWAY COMPANY
vs.
ANDREW RYAN, Marshall of the City of Cheyenne, and THE CITY OF CHEYENNE. } No. 7.

45 On this 30th day of November, at the November term of 1880, the orator's motion of September 18th, 1880, for an injunction *pendente lite* or other meet relief in this case having been heard, W. W. Corlett, appearing as counsel for the orator, and Charles N. Potter as counsel for the defense, it is ordered that the present injunction be, and the same is hereby, continued.

Final Decree.

WEDNESDAY, *December 22nd*, 1880.

THE UNION PACIFIC RAILWAY COMPANY
vs.
ANDREW RYAN and THE CITY OF CHEYENNE. } No. 7.

At this, the November term of the court for A. D. 1880, this cause having been heard upon the bill of complaint and the demurrer thereto, Charles N. Potter appearing as counsel for, and William W. Corlett, appearing as counsel against the demurrer, and it appearing that the city made an assessment for said year of the orator's property, described as follows, and as valued in the assessment
46 as follows, namely: Two miles of main track, road-bed, &c., at sixteen thousand dollars ($16,000); six miles of side track at thirty-three thousand dollars ($33,000); one mile of road to military depot at forty-five hundred dollars ($4,500); one railroad hotel at ten thousand dollars ($10,000); one passenger depot and appurtenances at twelve hundred dollars ($1,200); one freight depot and appurtenances at twelve hundred dollars ($1,200); one round house and appurtenances at twenty-five hundred dollars ($2,500); six frame dwelling-houses at three thousand dollars ($3,000); one express office and appurtenances at one thousand dollars ($1,000); one water and wood depot and appurtenances at two thousand dollars ($2,000); telegraph poles at one thousand dollars ($1,000); proportional value of rolling-stock in Cheyenne, as terminus, at one hundred and seventeen thousand dollars ($117,000); one freight depot and office at twelve hundred dollars ($1,200); one passenger depot at six hundred dollars ($600); one frame building on the main track of the Union Pacific Railroad at two hundred dollars ($200);
47 proportional value of rolling-stock used on the Colorado Central Railroad at seven thousand and five hundred dollars ($7,500), which property, is the same that is claimed in the bill to be assessable only by the territorial board of equalization; that the city has levied taxes upon the assessment against the orators, a part of which is unpaid, and has issued a certified tax list and a warrant for the collection of the outstanding taxes, and the following matters having been duly considered—

It is ordered, adjudged, and decreed, that said assessment and taxes, tax list, warrant, and all proceedings heretofore had thereon or on either therefor by the city, said Ryan, or their representatives, or any of them, are void and null, that they be and they are annulled and vacated; and that The City of Cheyenne, said Ryan, and each of their representatives, are perpetually enjoined from all attempt to execute the warrant and force the collection of any of the taxes or use the assessment.

Done in open court, this 22d day of December, A. D. 1880.

48 *Notice of Appeal.*

In the District Court, First District, Wyoming Territory. In Chancery.

UNION PACIFIC RAILWAY COMPANY
vs.
ANDREW RYAN, Marshal of the City of Cheyenne, and THE CITY OF CHEYENNE.

Notice is hereby given that said defendants' appeal from the decree rendered in said above entitled action, December 22nd, A. D. 1880, to the supreme court of Wyoming Territory.

C. N. POTTER,
Solicitor for Defendants.

Said notice of appeal is endorsed as follows:

In chancery. Union Pacific Railway Company *vs.* A. Ryan, marshal, *et al.* Notice of appeal. Filed January 11th, 1881. Jno. K. Jeffrey, register. C. N. Potter, sol'r for def'ts.

49 TERRITORY OF WYOMING, } *ss:*
County of Laramie, }

I, Jno. K. Jeffrey, clerk 1st dist. court and register in chancery, do hereby certify that the annexed and foregoing is a true and correct copy of the bill of complaint, pleadings, orders, and journal entries in the cause entitled The Union Pacific Railway Company *vs.* Andrew Ryan, marshal of the city of Cheyenne, and The City of Cheyenne, so full and complete as the same remain on file and of record in my office.

In witness whereof, I have hereunto set my hand and the seal of said court, this 31st day of January, A. D. 1881.

[SEAL.] JNO. K. JEFFREY,
Clerk 1st Dist. Court, Wyo., and
Register in Chancery of said Court.

Endorsed on the back as follows:

50 No. 171. Transcript. The Union Pacific Railway Company *vs.* Andrew Ryan, marshal of the city of Cheyenne, and The City of Cheyenne. Filed February 18th, 1881. J. W. Bruner, clerk supreme court.

And at the regular March term, A. D. 1881, of the supreme court of Wyoming Territory, the following order was entered of record on the journal of said court in the words and figures, to wit:

March Term, 1881.

TUESDAY, *May 17th*, 1881.

THE UNION PACIFIC RAILWAY COMPANY, Appellee,
vs.
ANDREW RYAN, Marshal of the City of Cheyenne, and THE CITY OF CHEYENNE, Appellants. } No. 171.

The court having fully considered the transcript of the record in

this cause as well as the argument of the counsel, doth order
51 and adjudge for reasons given in writing, and filed with the papers in this case, that the decree rendered in the court below be reversed and the case remanded to the district court, in the first judicial district in and for Laramie county, with instructions to said court to dissolve the injunction by it awarded; to dismiss the bill of complainant, (the complainant there, the appellee here) but without prejudice, the appellants to have their costs in both courts.

And on the said 17th day of May, 1881, there was filed in said court in the cause aforesaid, an opinion, in the words and figures, to wit:

THE UNION PACIFIC RAILWAY COMPANY, Appellee,
vs.
ANDREW RYAN, Marshall of the City of Cheyenne, and THE CITY OF CHEYENNE, Appellants.

This was a suit in chancery, instituted by the complainant
52 against the defendants in the court below, to restrain them from the collection of certain taxes claimed by the city of Cheyenne for the year 1880. The complainant asserts several grounds of equitable relief.

First. It claims there was no lawful assessment of that portion of the complainant's property constituting its road-bed, right of way, superstructure, structures thereon, rolling-stock, telegraph line, furniture and fixtures, and personal property belonging to the appellee, who was the complainant below, the assessment being made by the city assessor, while it is claimed that it should have been made by the Territorial assessment board, under the act approved December 13th, 1879, of the Territorial Legislature of Wyoming, entitled "An act in relation to the assessment of railways and telegraph lines."

Second. That in any event the so-called city assessor had no authority to make said assessment, no such officer as city assessor having been provided for by the charter of said city.

53 Third. That the assessment of the complainant's property upon which the tax claimed was levied was grossly unfair, unjust, and unequal, and was fraudulently made, with a fraudulent purpose and intent to make the complainant pay an unjust and undue proportion of the taxes collected in said city, all of which was done with a feeling of prejudice and hostility to the complainant.

Fourth. That a portion of the taxes so claimed was levied upon a large amount of property not belonging to the complainant, but to another corporation, the Colorado Central Railroad Company of Wyoming, which property last named was not in the jurisdiction of the city of Cheyenne.

To the bill of complaint filed by complainant the defendant demurred—

1. To so much of the bill as relates to all the taxes complained of, except those claimed on account of the Colorado Central Railroad Company, on the ground that the complainant was not entitled to any discovery or relief.

54 2. To that portion of the bill relating to the assessment of the property of the Colorado Central Railroad Company, and the taxes levied upon the same, on the ground that the complainant was entitled neither to discovery nor relief by reason of the facts stated.

The district court for the first judicial district, Judge Peck presiding, having heard the case upon said bill of complaint and demurrer, entered a final decree thereon, adjudging the assessments complained of and all proceedings thereon null and void, and perpetually enjoined the defendants from attempting to collect the taxes levied thereon. The appellants appeal from said decree in its entirety, and not from any part of it. The appellants concede that the decree is proper, and no contest is made as to the part of the bill relating to the taxation of the Colorado Central Railroad Company.

The first question which presents itself for determination by this court is, whether the city of Cheyenne, for the purpose of
55 municipal taxation, had the right to assess the property of the appellee situated within its corporal limits in the same manner as other property in the city is assessed, according to the provisions of its charter, which gives it power "to levy and collect taxes for general revenue purposes on all real, personal, and mixed property within the limits of said city, taxable under the laws of the Territory," according to the terms of its charter as found in the Session Laws, 1877, page 40, 41; or whether an act of the General Assembly of 1879, passed on the 13th of December of that year, to take effect on the 1st of January, 1880, in relation to the assessment of railways and telegraph lines, repealed the charter of the city of Cheyenne to that extent, and cast upon the territorial board of equalization, consisting of the governor, territorial treasurer, and auditor the duty of fixing the value of the property of railroad corporations for each mile of road or line, and thereafter required all assessments of railroad and telegraph property to be made
56 in conformity with the value as ascertained by this board of equalization.

In our opinion the statement in the syllabus of Mayor, &c., of Troy *v.* The Mutual Bank, 20 New York, 387, that "the system of taxation for municipal purposes is distinct and independent of that for county and State purposes," is not only sound law, but sound common sense, and this line of demarkation runs through all the legislation of the various States as well as of the Territory of Wyoming. An inspection of the sixth chapter of the laws of Wyoming, passed at its sixth Legislative Assembly, on page 13th of those laws, shows that the Governor, the territorial treasurer, and auditor, are made a board of equalization evidently for the purposes of having uniformity in the assessment and taxation of railroad and telegraph lines within the several organized counties, and for county and territorial purposes only: and that that act in nowise worked or intended to work a repeal of the charter of the city of Chey-
57 enne, which was granted by the Legislature in 1877. That act shows what the board was to do. That act prescribes

what the president, secretary, superintendent, or other principal accounting officers should do. It speaks of the duty of the assessor of the county of district, evidently meaning the district in the county in which machine or repair shops or other buildings should be. It prescribes when it shall be done. It specifies that the territorial auditor shall certify to the county clerks of the several counties in which the property of the corporation or any part thereof may be situated, the assessment so made of the property of such corporation, specifying the number of miles and amount in each of said counties, and then the county commissioners are directed to divide and adjust the number of miles within each precinct, township, or school district in their respective counties; and then it goes on to give the county commissioners power to levy the requisite tax, all of which shows that the act was intended to effect the county organizations
58 and not particular municipalities or municipal corporations. The county commissioners have no control over the cities. It may happen, and does happen, that the county commissioners are not citizens of the corporations. It could happen that every one of the county commissioners might be a citizen outside of the jurisdictional limits of Cheyenne, and while it would be in the power of the General Assembly of Wyoming, by an express statute, to confer the government of the municipality of Cheyenne upon anybody that it saw fit, yet with a granted charter before it this court cannot presume that county commissioners are clothed with any power or authority over the city of Cheyenne from that act. The only thing that gives color, or can be construed or suggested as giving this authority, is the use for the first time in this Territory in a taxing act of the word "precinct," and this, it is seriously claimed, may
59 mean an organized municipal corporation. Now "precinct," according to Webster, means a "district within certain boundaries," and in Massachusetts, by old laws, it had reference to the non-acceptance by the collector of the parish or *precinct*, and authorized the parish to proceed to a new choice.

Bouvier says: "In old times it related to the distrust for which a high or petty constable is appointed in England," and with this use of the word in modern acceptation, it has been argued before the court that it may mean, and is intended to embrace and include, a repeal of the power of the city of Cheyenne to levy and assess taxes as given to it by its charter, and to cast that burden on a board made up as before stated. We do not think that such is the meaning, nor do we think any elaborate argument is necessary in stating it. If it be contended that the word township can be so construed as to mean an incorporated city, we answer—1st, that no such ground was taken in argument at bar; and, 2nd, that township has a well de-
60 fined meaning, *vide* Abbott's Law Dictionary, viz: A township is a subdivision of a county for county purposes more highly organized than a village, and less so than an incorporated city. The term "township," in cases there cited, shows it never means an incorporated city. Of course there can be no pretense that Cheyenne of itself is a school district of Laramie county in any sense.

The whole act from the first to the sixth section has reference to the uniformity of assessments and taxation for territorial and county purposes, and has no reference in our view to city purposes.

This brings us to the second proposition, to wit: Did the city of Cheyenne assess the property as it had the right to do? Inasmuch as the complainant alleges that the board of equalization for the city acted fraudulently, it is not within our power to *say* (inasmuch as the demurrer admits all that the complainant states) that the tax has been regularly assessed; but in so far as the question is raised as to the right of the city assessor to make said assessment,
61 no such officer as city assessor having been provided for by the charter of said city, we answer that by the tenth section of the act of incorporation of the city of Cheyenne, passed December 14th, 1877, Laws of the 5th Legislative Assembly, beginning page 37, the city is provided among other officers with a clerk; and by section thirty it is enacted that the duties, powers, and privileges of all the officers connected with the city government not herein defined shall be defined by ordinance of the city council; and by an ordinance of said city as enacted February 4th, 1879, (of which this court takes judicial cognizance), the published ordinances in printed form being before it, *vide* 30th subdivision, 20th section, act to *to* incorporate city of Cheyenne, approved Dec. 14th, 1877, page 46, Act 5th Legislative Assembly. The city clerk is made *ex-officio* city assessor; and this not only follows the law of the Territory, but follows decision of the Mayor, etc., of Hoboken *v.* Harrison, Harp, and Walker in the 30 New Jersey, 1 Broom. It is the power of the council by ordinance to direct the mode and manner
62 of the assessment and collection of the taxes. Hence it results that where a power is given to a council to levy and collect taxes, and no officer is provided in a charter, as a necessary consequence that the right to levy and collect taxes would carry with it the power and authority to employ the necessary machinery for that purpose.

Having ascertained this much, we find the pretended city assessor, as the complainant describes him, had the authority to make the assessment complained of.

The third allegation of the complainant's bill, that the assessment of the complainant's property, upon which the tax claimed was levied, was grossly unfair, unjust, and unequal, etc., being admitted by the demurrer, we cannot do more here now than to lay down this proposition, which is sanctioned and sustained by all the decisions; that before the complainant can have or ought to have any standing in a court of equity to make such an assertion, the complainant should pay what is due. This is laid down in
63 Heine *v.* The Levee Commissioners, 19 Wallace, 655; by the Alabama Gold Life Insurance Company *v.* Lott, tax collector, 54 Alabama, 499; in the 24 Michigan, in Merrill *v.* Humphrey, 170; in the 83 Ill., The Pacific Hotel Company *v.* Liel *et al.*, 602; 2 Otto, 575, State railroad tax cases.

Now, the complainant alleges in its bill of complaint that it tendered what was due, to wit, the sum of $363.40. Now, even if the

territorial board had had the authority to have made the assessment for the city of Cheyenne of the property of the Union Pacific Railway Co. in and within the city of Cheyenne for city purposes, by the complainant's own bill this was insufficient, and was not the amount due. Complainant admits in his complaint that he owns within the city two and two-tenths miles; that he owns a branch road of one mile, making three and two-tenths; and he owns the property of the Denver Pacific railroad, half a mile, which makes three and seven-tenths miles, whereas in its summary, in the concluding part of its bill, in which it puts the amount that he is justly assessable
64 with under its theory of the law at 29,600 dollars, besides its real estate values at $2,000, by its statement, which is the assessment for three and two-tenths miles, and not for three and seven-tenths miles, as it admits in the opening part of its complaint, so that even upon its own theory of the law and its own theory of its liability to assessment, it had not paid or offered to pay when this bill was brought what was due by the tax on a four-thousand six hundred & twenty-five dollars ($4,625) at eleven and a half mills, the city rate would be $53.18; and by the complainant's own showing this amount was then due and payable, and should have been paid as a condition precedent to an injunction. And if the city clerk, acting as city assessor, had the right to assess the complainant's property, subject to the authority and control of the council to correct and equalize said assessments, of course a large sum would be due and owing, as by complainant's own statements is shown in his allegations as to over assessments; and this sum should
65 be paid as a condition precedent to the awarding of any injunction to restrain whatever may be illegal and fraudulent, as in complainant's bill is charged.

But the complainant alleges that the city council, acting as a board of equalization, unlawfully, wrongfully, and fraudulently did pretend to correct and equalize the said assessment as returned to it by said John K. Jeffrey, so that the same, as equalized and corrected by said city council, was as follows: 2 miles main track, roadbed, etc., $8,000 per mile, $16,000; 6 miles side track, $5,500 per mile, $33,000, leaving all other items in the said assessment to stand, as returned by John K. Jeffrey; and they corrected and equalized the property formerly belonging to the Denver Pacific Railway and Telegraph Company, so the passenger depot was assessed at $500, the rolling stock, proportional value, in Cheyenne terminus, $17,000, leaving all other items of the assessment as made by J. K. Jeffrey.

Now, upon an inspection, it will be seen that Jeffrey, as
66 assessor, had put down four miles of main track at $8,000 and four miles of side track at $1,500. The full assessment of the eight miles by Jeffrey's assessment was $50,000; as equalized and returned by the council it was $49,000. The complainant claims that the council acted unlawfully, wrongfully, and fraudulently, and yet makes no such allegation as to Jeffrey; and if the complainant's allegations are true, and for all the purposes of this consideration, standing upon a demurrer it must be so considered, it will be seen that the city counsel absolutely reduced the assessment $1,000 on

these eight miles, so that the assessment, as unlawful, wrongful, and fraudulent, as plaintiffs' claim to have been corrected and equalized by the city council, was absolutely reduced $1,000 on the Denver Pacific. The wood passenger depot was put down at $800 by Jeffrey, and reduced to $600 by the city council, whereas the rolling stock, proportional value, in Cheyenne, was put down by Jeffrey at $10,000, and by the council raised to $17,000, an excess of $7,000, so
67 that, putting one against the other, it will be seen that the increase by the council over Jeffrey's assessment was the sum of $5,800. Now, as the complainant alleges that this was done unlawfully, wrongfully, and fraudulently, and was made as it is conceded that there was no authority to assess the property of the Colorado Central to the Union Pacific Railway Company, and as the demurrer for all purposes of this case so admits, yet as the bill on its face shows that the complainant has not paid the taxes fairly conceded or shown to be due, to entitle it to be heard in a court of equity, and as it may have a case upon a proper bill for relief in equity, whilst this bill in our opinion will have to be dismissed and the injunction awarded will have to be annulled and set aside, yet in doing so the court will, following the supreme court of Michigan in Merrill *v.* Humphrey, 24 Mich., 170, while ordering the decree of the court below to be reversed and the injunction to be dis-
68 solved, but the bill to be dismissed without prejudice, the appellants to have their costs in both courts.

Endorsed on the back as follows: No. 171. U. P. R. R. Co., appellee, *vs.* City of Cheyenne *et al.*, &c., appellants. Opinion of court. Filed May 17th, 1881. J. W. Bruner, clerk.

And on the same said 17th day of May, A. D. 1881, there was filed a dissenting opinion in said cause in the case aforesaid, in the words and figures following, to wit:

69 *Dissenting Opinion by Mr. Justice Peck.*

TERRITORY OF WYOMING:

Supreme Court. March Term, 1881.

THE UNION PACIFIC RAILWAY COMPANY, Appellees,
vs.
ANDREW RYAN and THE CITY OF CHEYENNE, Appellants.

The bill was brought by the above-named company in the district court. It states that the Union Pacific Railroad Company was incorporated under Federal statutes for the construction and operation of a railroad and telegraph line. That afterwards, and by 1869, the company located and built its railroad and telegraph line from Omaha westward thro' this Territory to a point of union with the Central Pacific railroad, which was being built eastward from California, and equipped the road; and that it and the telegraph line were accepted by the Federal Government all in accordance
70 with the charter; and that since their completion they have been so operated. That the construction of the road and

line was necessary to the public service of the United States; the principal object sought for and obtained by the incorporations and the construction of the road and lines being to secure to the Government the transportation of its dispatches and the safe and speedy transportation of its mails, troops, munitions of war, and public stores thro' a country remote, then unsettled and uninhabited, accessible only by great difficulty and expense, and wherein there were no facilities for accomplishing those purposes. That in accordance with the charter, and on January 24th, 1880, the Union Pacific Railroad Company was consolidated with two corporations, the Kansas Pacific Railroad Company and the Denver Pacific Railway and Telegraph Company under the name of the Union Pacific Railway Company, which is the orator; and that by the consolidation the latter became possessed
of all the franchises and property of the three companies.
71 That the orator's main line—the road and telegraph line so constructed by the Union Pacific Railroad Company—runs thro' the city of Cheyenne for the distance of two miles and two-tenths of a mile; that it owns within the city a branch railroad track of the length of one mile, a railroad track formerly belonging to the Denver Pacific Railway and Telegraph Company of the length of one-half mile, and six miles of side track. That Cheyenne is a municipal corporation, created under sundry acts of the Territorial Legislature.

That the clerk of the city returned to the common council for 1880 an assessment against the orator, which was equalized and corrected by the council, and as equalized and corrected assessed the orator for property described as follows, and which I tabulate from the bill: "Two miles main track, road-bed, &c," one-half mile of main track, formerly that of the Denver Pacific Railway and Telegraph Company, six miles of side track, one mile of road to
72 military depot, proportional value of rolling-stock, and on the Colorado Central railroad proportional value of rolling-stock, and in Cheyenne as terminus, one hotel, four depots, passenger and freight, and appurtenances, round-house and appurtenances, six dwelling-houses, frame buildings, water and wood depot & appurtenances, express office and furniture, telegraph poles, the assessment specifying a value to each item of said property, the aggregate value being $226,900.

That the assessment so returned corrected and equalized, included also lands of the orator which were located within the city and without its right of way, which said lands and tabulated items were all the property that was embraced in the assessment as the orator's.

That the council has levied taxes on the equalized and corrected assessment, and the city clerk has delivered to said Ryan, the city
marshal and *ex-officio* tax collector, for their collection a tax
73 list, certificate, and warrant, issued against the orator.

That said proceeding of levy and assessment, and issuance and delivery of the tax list, certificate, and warrant, were had in pursuance of an ordinance of the city.

That excepting the Colorado Central railroad rolling-stock and the lands, the property so assessed to the orator consisted of its right

of way of road and line, all structures situate thereon (the road-bed and superstructures thereby included), its rolling-stock, side track, telegraph lines, furniture, fixtures, and personal property located within the city; that the Colorado Central railroad was, at the time of making the assessment, owned, and is now owned, by the Colorado Central Railroad Company, a corporation distinct from the orator, and its road not extending within the city limits; that the total of the taxes levied against the orator upon the assessment is $2,888\frac{14}{100}$, of which $253\frac{75}{100}$ are upon its said lands located within the city and without its right of way, and $886\frac{75}{100}$ for the Colorado Central railroad rolling-stock; that of the taxes the orator
71 has paid the $253\frac{75}{100}$, and $363\frac{40}{100}$ of the residue of the total of the levy, and has been discharged by the city *pro tanto*, leaving outstanding and exposed to enforcement $2,271.16, and that the collector threatens to enforce forthwith the collection of this balance; that the orator owns a large amount of lands in the city outside of the right of way, which lands are in the market for sale, and the sales of which are embarrassed by the lien that stands upon the lands because of the taxes under the territorial law; that the territorial board of equalization assessed and valued the orator's property, consisting of the right of way of its said roads and telegraph lines, the structures situated on said rights of way, side track, road-bed, and its superstructures included, rolling-stock, telegraph lines, furniture, fixtures, and personal property, for each mile of said roads and lines, determined the value of each mile thereof by dividing the sum of the valuation by the number of miles of road and line, and thus ascertained the value of each mile to be $9,250, which assessment and valuation were made for 1880. Upon these facts the bill complains, and specially
75 designates that the orator is exposed to varied injury which is irreparable at law; and asks for special and general relief here, including relief by injunction. The defendant demurred to the whole bill for want of equity. Upon that issue the district court passed a decree, which—reciting that the city had assessed for that year against the *the* orator certain property, itemising it as it is itemised in the above tabulation, with the exception that it omitted the "½ mile of main track, formerly belonging to the Denver Pacific Railway & Telegraph Company," and adding the itemised valuation as they appear in the bill, with the exception that the recital specified a valuation of $2,500 for the "round-house and appurtenances," instead of $25,000, the actual valuation further reciting that the recited property was the same that was claimed in the bill as only assessable by the territorial board of equalization; that the city had levied taxes upon the assessment, and against the orator, of which a part were unpaid; and had issued a certified tax
76 list and warrant for the collection of that part—decreed that the assessment, taxes, tax lists, warrant, and all proceedings theretofore had thereon or on any of them by the city, Ryan, or any of their representatives were void and null; that they were thereby annulled and vacated; and that the city, Ryan, and each of their representatives were perpetually enjoined from all attempt

to execute the warrant, enforce the collection of any of the taxes, or use the assessment. It is clear that the decree was intended to be a sweeping decree against all the assessment but the part relating to the lands and against all the outstanding taxes; the item of ½ mile of the main track of the Denver Pacific Railway and Telegraph Company having been omitted, and the value of the round-house and its appurtenances mis-tated in the recital by inadvertance. What the symbol, "&c.," means in the assessment item, described as "two miles main track, road-bed, &c.," it is impossible to understand; the use of the symbol in assessment description is vicious and unlawful; the tax-payer cannot be assessed by expressions, which con-
77 ceal the property assessed, and serve equally to cover something and to cover nothing; and whether the objection might or might not have been reached here, had the assessment specified separate values for the "&c." and the residue of the item, yet as but one value was extended in gross against the item, should it result that that residue was beyond the assessing jurisdiction of the city, the objection for defect of jurisdiction will necessarily cover the whole item. Again, tho' no right of way *eo nomine* appears in the assessment, the latter is consistent with the allegation of the bill that all the property assessed to the orator except the lands and the Colorado Central railroad rolling-stock consisted of its rights of way and the structures situated thereon, side tracks, road-bed, and superstructures included, its rolling-stock, telegraph lines, furniture, fixtures, and personal property located in the city. The assessment of the lands is conceded to be correct; the validity of the rest of the assessment is denied. The defendants justify the part so de-
78 nied under section one at page 30 of the laws of 1879, of the statute of November 26th of that year, amending the city charter of December 14th, 1877, which section declares that it shall have power to assess, levy, and collect taxes for general revenue purposes on all real, personal, and mixed property within its limits, taxable under the laws of the Territory; that to compel payment of taxes it may distrain and sell personal property; that all his taxes shall be liens upon the lands of the tax-payer; that the city may sell for taxes lands so under lien, and convey them to purchasers, and may attach a penalty to delinquent taxes; and may by ordinance provide for the exercise of these powers. The orator claims that the property which is embraced in that part of the assessment whose validity is controverted can be assessed only under the statute of December 13th, 1879, entitled "An act in relation to the assessment of railways and telegraph lines," at page 13 of the laws of 1879. The two statutes relate to the same subject-matter, and
79 the question under which there was the disputed property assessable turns upon the enquiry whether the act of November was repealed by that of December as to the description of property that is covered by the latter. If not repealed the city had, if repealed it had not, jurisdiction to make the assessment, and in the latter case the assessment is void.

I will at first consider the question by treating the earlier act as special, and the later one as general. Section five of the latter de-

clares: "All acts and parts of acts providing for the assessment of the property of railroad and telegraph companies, and the equalization of assessments, inconsistent with the provisions of this act, are hereby repealed, so far as they provide for the assessment and equalization of the property of said railroad and telegraph companies."

As the section makes inconsistency the test of repeal, it brings us directly to the rule of repugnance.

The appellants claims that a prior special act, passed for the
80 benefit of a municipality, cannot be impliedly repealed by a subsequent general one; but the proposition is wholly untenable. Implied repeal is not favored, because of the presumption that had the Legislature intended to repeal, it would have said so in direct terms, and because of the difficulties and hazards which attend the application of the rule of implied repeal. The disfavor increases between a special and a later general statute, because of the other presumption, that, as between special and general terms on the same subject, the special were intended to control; but, whether the prior law be general or special, an implied will dispense with the necessity of an express repeal, provided implication applies in the given case, and is complete in itself. The two laws being upon the same subject-matter, the whole enquiry is one of intent. If the later law intends to terminate the earlier, the effect must necessarily follow, for the Legislature will, being supreme within its sphere, its latest expression on the same subject must prevail; and it is a mere difference of forms, and therefore immaterial
81 whether that will be expressed directly or indirectly. But to rise to the force or equivalence of direct expression, the implication must be necessary—unavoidable; it can be such only when the two acts are repugnant—irreconcilable. If, after thorough comparison, they remain in this antagonism, the intention is manifest; and as the later must operate, the earlier must yield. Repugnancy being the criterion, it must rule the prior statute as much, if special, as if general. The following are tests: Is the new intended to be a revision of the old? If it is, it is a substitute for the old; or, the two being upon the same subject, does it introduce a new, and what is clearly intended to be, the sole rule upon the subject? If it does, it displaces the old. Do the statutes confer the same power upon two different public bodies, and one which cannot consistently with the clear object of the Legislature be exercised by both? If so, the later must prevail. Can the later be satisfied with-
82 out infringing upon the former? If not, it overrules it. The following cases show that what I call tests are adjudicated propositions. The 13 How., 492, Norris *vs.* Crocket, and 11 Wall., 88, United States *v.* Gyner, held that, if the new statute covers the entire subject-matter of the old, with changes, it is a substitute for it. The 11 Wall., 652, Henderson's Tobacco, that if the new contains new provisions on that subject-matter, plainly showing an intention to operate as its substitute, it repeals it. The 33 Pa., 81 and 511, Wharton's Estate; 15 Cal., 291, Sacrimento *v.* Bird; 40 Miss., 268, Swaim *v.* Buck; 15 Gray, 54, Weeks *vs.* Walcott, that the later repeals the former act if it introduces a new rule on the same sub-

ject-matter which it intends shall be the only rule upon it. The 12 Allen, 480, Commonwealth *v.* Killiher, that the new repeals the old, if it revives it with slight variations; and the 12 C. B. N. S., 161, Daw *v.* Metropolitan Board, that where the same power is given by different statutes to different public bodies, and cannot be exercised by both consistently with the legislative object, the later statute will
83 prevail. These tests are different statements—varied illustrations of a rule, which turns upon one central element a repugnancy which, wherever it exists, inevitably works repeal. This has been and is the uniform rule in the Supreme Court of the United States, announced in cases already cited, and in others, and, therefore, governs here, whatever the law on the subject may be elsewhere. But from the nature of the subject it must be the universal rule. Remarks are made by judges and authors occasionally which, considered in the abstract, *aritur*, and the appellant's proposition, but which, considered in their connections, oppose it. The sum of the matter is that whatever embarrassments attend the rule relate not to its existence, but to its application.

Again, treating the rule of implied repeal as existing at the common law, I regard the repealing section in the act of December 13 as declaratory; but if the rule did not exist, so that without this repealing provision a repugnance between the two acts would
84 not work repeals, the provision would constitute a rule and, there being repugnancy, work repeal. Does this act repeal the first section of the act of November in respect to the property which the former commits to the territorial board of equalization for assessment? Are they in conflict in respect to jurisdiction over this property? The former act directs that every railroad and telegraph company having property situated in more than one county of the Territory when the company is assessed to furnish the auditor by July first, annually, for assessment and taxation, a list of the following property, belonging to the company in this Territory. The right of way, all structures situated therein (side tracks, road-bed, and *and* its superstructures and telegraph lines included), rolling-stock, furniture, fixtures, and personal property. The list to specify the number of miles or road or line within the Territory, and the number in each organized county in the Territory: that such return not having been
85 made, the auditor shall procure the prescribed information; that the list having been furnished, or information procured, the territorial board of equalization shall assess and value the property so returned to it for each mile of the road or line, and for that purpose shall consider the list furnished by the company, or the information procured by the auditor, and such other reliable information as it can obtain upon the subject, and shall ascertain the value per mile by dividing the total of the valuation by the total of the miles of the road or line. The unmistakable interest of the provision is that, in ascertaining the total and the mile valuations, the board shall treat the right of way, all erections and improvements within it, the rolling-stock, furniture, fixtures, and personal property as the component parts of that whole, and the miles as of equal relative value.

This method of valuing a railroad or telegraph for taxation con-

iders the road or line as a unit or an entirety, each part as inseparable from all the other parts, as dependent for its own value upon all the other parts, and as contributing equally with every other equal part, to the value of the rest. And the component
86 items of right of way, erections and improvements therein, rolling-stock, furniture, fixtures, and personal property as the component items of the equal parts of the road or line in equal degree. The method then is to value the whole by equalizing the values of the parts and proceeds upon the only correct principle. From its very nature the principle calls for uniformity of application; it applies with equal reason to one part of the Territory as to another, to a taxing district within a county as to a county, so far as the application is not uniform. The principle is an idle abstraction, and the exceptions senseless and unjust. The adoption of the principle strongly indicates an invention to inaugurate it into an uniform rule, and unless some other provision limits the action of the principle, it must be because there is nothing to prevent its being the uniform rule. The charter declares that the city may assess, as it shall provide by ordinance; that is, that the city may assess at will. For the purposes of assessment it empowers the city to
87 treat a portion of the road or line as a unit, an entirety and inseparable part as a separated whole. The city exercised this power by the ordinance, under which its present assessment was made.

Regarding each assessment as correctly, and therefore as fairly made under its principles, no more striking illustration of the mischief and wrong of ununiformity, and of the justice and necessity of uniformity can be desired: there is prevented by the discrepancy between the assessments, the city valuing at $226,900 property which the board values at less than $34,225; the difference resulting from a disregard of the principle of equalization, and the appropriation to the city as a basis of taxation more than $192,675 of value, which belong to the rest of the road and line, outside of the city, by the rule of diffusion—the rule of unit, the entirety—and no more belongs to the city than it would if this difference represented property locally situated beyond the city limits. The discrepancy is rendered more striking by the fact that the city assessment embraces no personal property, furniture, or fixtures, unless the
88 items of appurtenances, specified in the assessment in connection with passenger, freight, water, and wood depots, cover them, and except, also, the furniture of an express office, while the board assessment embraces personal property, furniture, and fixtures generally.

As the orator's road and telegraph line run within the same right of way, the mile valuation must be taken to cover the two in the board valuation.

The history of the legislation in the Territory upon the subject pertains to the understanding of the act of December 13th in respect to the extent of its application. The theory of all the statutes approved before December 13th, 1879, and beginning on December 10th, 1869, for raising territorial and county revenue by taxa-

tion of a railroad company, whose road ran into more than one county, was, that all its property, actually located in a county, should be assessed to that county as a unit or an entirety of value, separate from the company property located in the rest of the Territory, except only the rolling-stock, which was to be apportioned to each county in the proportion of the number of miles
89 in the county to the length of the road. The orator's main road only has passed into more than one county of the Territory, its telegraph line being practically a part of it. While the theory of the territorial and county revenue system was not confined to this road, it embraced the road, and the latter must have been in the special view of the Legislature in the adoption of the theory. The school acts, beginning with December 10th, 1869, provided for school district taxation based on the county assessor's return, without prescribing the principle or method of assessment to be observed by him. Up to December 10th, 1873, he could, and afterwards was obliged to, return the school district and county assessments together, and would naturally make the former as he did the latter. The most expensive and, therefore, most enormous school districts have embraced the more populous sections, and thus the course of this road. The general act of December 16th, 1871, for the incorporation of towns and cities, in providing for their municipal taxes, required the county assessor, in making up the
90 county roll, to note against the name of each tax-payer all the property owned by him within the municipal limits, so that the municipal followed the rule of the county assessment in respect to railroad property. The first charter of the city of Laramie, passed December 13th, 1873, empowered the board of trustees to make such ordinances, consistent with the organic act and the other laws of the Territory, as should be necessary to the government of the city, rendering the board in the first instance the judge of what would be necessary; and the charter also required the city assessor to assess all property liable to taxation in the city (and that included railroad and telegraph property), under such regulations as the board should prescribe, and to return his assessment to the board, by whom it should be revised. The second charter, passed December 29th, 1875, conferred upon the board the same power to make ordinances; required the city assessor to assess at the true cash value and return his assessment to the board, which, with the assessor, was to be a board of revision. The amendments
91 of 1877 and 1879 to this charter leave it unaffected in these particulars of power. The two being all the charters of Cheyenne passed severally on December 10th, 1869, and December 14th, 1877, confer upon its board of trustees like power to make ordinances, and provide that the assessment shall be made in such manner as the board shall prescribe; and the amendments to the charters left them unaffected in these particulars of power. Their respective charters authorized those two cities to assess in their judgment, and directly invited them to assess upon the principle not of unity, but of seperation. Prior to December 13th, 1879, the only board of territorial revision was the territorial board of equalization; but its

jurisdiction was limited to revising the county assessments of real estate, and as to that to equalizing by adding to the aggregate valuation of a county so far as it was undervalued and deducting from that aggregate so far as it was overvalued, and it is at least seriously questionable whether this power was not confined to making a real estate basis of valuation for the Territory. But this jurisdic-
92 tion of the territorial board was not intended to serve, nor did it serve, the purpose of assessing a railroad or a telegraph line, which extended into more than one county, as a unit of value, because it took in property which was without and excluded property which was within the limit. Thus the statute stood until December 13th, 1879; the several taxing districts bound to no common rule of assessing this road and line—some required and the rest permitted to assess against this principle of unity upon the principle of separation.

It necessarily followed that some districts were deprived of values that were due to them, and that others appropriated values that were in excess on their dues, and that where no bad faith was intended against the company, valuation would often, for the want of a common standard, be inflated. A more complete system of unequal taxation could hardly be devised than is presented by this mass of nonuniform, incongruent legislation. This condition of the statutes constituted an imperative need of corrective legislation, and
93 put upon the Legislature the duty to supply it by a unifying system. I am compelled to say that the act of December 13th, 1879, so far as it has been analized in this opinion, meets this want and satisfies this duty. Let us next see how its further provisions bear upon the idea that it intended to correct the evils by becoming the future rule of all the taxing districts.

The statute next provides that after the territorial board of equalization shall have so assessed and valued the road and line, the territorial auditor shall certify to the clerk of each county in which property of the company is situated the mile assessment so made, the number of miles in each county, and the aggregate of the assessment due to the county; and that "the county commissioners shall thereupon divide and adjust the number of miles, and the amounts falling within each precinct, township, and school district within their respective counties, and cause such amounts to be entered and placed on the lists of taxable property returned by the several
94 assessors." As the county proportion of the assessment is merely certified to the county clerk, a subsequent provision of the act requires the county commissioners, in levying the county taxes, to treat it as a part of the general county assessment. As the apportionment to the precincts, townships, and school districts go directly upon their assessment lists, it follows that the taxes thereafter laid on those lists embrace their apportionments. What, then, does "precinct" here mean? Presumably it was inserted in the text to assist in the expression of its intent. Unless it can be shown to be meaningless, or that it must be cast out in order to give effect to the text, the court is no more at liberty to ignore it than it is to strike it out, to alter, to reconstruct the statute. It is conceded that

it has a function in presenting the sense of the act; that effect must be given to it, so as to give effect to the act. Indeed, an apportionment must be made to the precinct by the command of the statute. It is also conceded that "precinct" means as it stands in the text—taxing precinct, the same as if the text so read "precinct" is its textual connection; is relative to county; signifies
95 a minor territorial or jurisdictional divisions, is a generic term, to which "township," "school district," are specific, and in which they are included; and a taxing territorial jurisdiction or division is a taxing district; hence the textual rendition is that the commissioners shall appoint to every township, school district, or other minor taxing district, the number of miles and valuation aggregate that fall within it, and cause the same to be entered upon its assessment roll. If more clearness is needed to this interpretation of "precinct" as a functional term in this text, it is furnished by the prefix "each;" the reading is "each precinct."

Cities are thus included as taxing districts as clearly and completely as if they were specified *eo nomine*. What does the word "township" here mean? Unquestionably it signifies in its connections, not an unincorporated division of a country, but an existing municipality—one of its senses in the corporation of a
96 town; and this is the sense in which the statute employs it; the same as if the reading was "town" instead of "township." "Town" means or includes "city" in a statute, if the sense so requires. In many of the States of the Union the terms "town," "city," as law terms, are synonymous. In England "city" means "an incorporated town." In the general sense of incorporations the terms are equivalent; but there is a technically specific sense in which they differ, "town" being a municipality whose municipal laws and regulations are established by the popular vote of the town, and entrusted for execution to officers elected by that vote, and "city" a municipality, where the making and execution of the municipal laws and regulations are committed by the popular vote of the city to its officers elected by that vote. Now, between these generic and specific senses the statute should be read in the former as the broader sense, because it is a corrective statute; therefore calls for a liberal construction the better to effectuate the
97 intended remedy. The statute is corrected, because it was passed, not to declare, but to change the law; thus assumes that the change was needed to supply a want; the want was a misrelief.

Again, the charter of Cheyenne made it a city in the specific sense; the amendments leave the characteristic, and "town;" is not used in the charters or amendments. The charters of Laramie made it a city; the amendments—they are only to the second one—leave the characteristic; but throughout the charters and amendments "town and city" are constantly met, and as equivalent these charters were *moddled* on those of Cheyenne. The act December 11th, 1873, incorporating Evanston, made it a city in the specific sense; was *moddled* after the first charter of Cheyenne, but designates it as a town, that term, not "city," only being used in the act. The act,

of December 16th, 1871, "for the regulation of towns and cities," which is a general incorporating act, used the terms synonymously. I have searched exhaustively the territorial statutes, and have found no instance in which they are not used in the same
98 sense. I conclude that the act of December 13 was intended to be a revision of, and a substitute for, the prior acts upon its subject-matters; that it introduced a new, and what it clearly intended should be, the sole rule upon that subject-matter; that it and those prior statutes confer the same power upon different public functionaries, one which cannot consistently with the clear purpose of the Legislature be exercised both by the new and old; that the act of December 13th cannot be satisfied without infringing on that of November 26th and the other previous acts; that the act of December 13th is repugnant to and irreconci-able with that of November 25th and those other acts, and repeals them to the extent of the repugnancy, and that the effect of the repeal, as to the act of November 26th, was to transfer the jurisdiction which the city of Cheyenne had anterior to January 1st, 1880, the date at which the repealing act took effect, for the assessment of the property that is covered by the latter acts, to and exclusively vested in the territorial
99 board of equalization; and, consequently, that the assessment which was made by the city of the orator's property, above tabulated in this opinion, excepting the Colorado Central railroad stock, and all the proceedings based upon the assessment are without jurisdiction and void.

As to the last-mentioned stock, the assessment of that is void for the same reasons, irrespective of and without passing upon the effect here of either of the facts that it did not belong to the orator, and that the road did not extend within the city limits.

In the conclusion that the statutes of November 26th and December 13th are repugnant, I have treated the latter as general legislation, thus subjecting it to the most rigid test of its meaning and considering it most favorably for the appellants; but the latter act is special in each of its particulars; the property covered by it, the method of listing, the principal and method of assessing, the method of apportioning the assessment, and the board empowered to assess, both acts being special, the repeal more clearly follows.

100 I think, however, that the act of Nov., tho' special as a municipal grant, is general in its grant of power, while that of December is special in its grant of power; hence the presumption that general yield to special words shifts from the later to the earlier statute, and we find, as the real starting point in the comparison, that this presumption is against the earlier and in favor of the later statute, thus the repeal still more clearly follows. The case of The State *vs.* Jersey City, 25 New Jersey Law Rep., 170, bears directly on this proposition, the general powers, as they were construed to be conferred upon the city by its charter, being held to be controlled by the special ones, as they were construed to be, which were conferred upon the railroad company by its charter.

The disputed assessment being jurisdictionally void it was the duty of the district court to vacate it; the taxes which were based

upon it, and the liens which were apparently created by the taxes, and to stay the collecton of the latter. The decree rendered
101 below should therefore be affirmed, but with a modification embracing the one-half mile of the main track of the Denver Pacific Railway and Telegraph Company, and rectifying the misstatement of the value of the round-house and its appurtenances.

The foregoing conclusion renders it unnecessary to consider a further ground of relief, which is claimed in the bill, namely, that a portion of the property, the jurisdiction to assess, which is claimed, was fraudulently assessed.

The majority of the court decide that if the bill presents ground for relief, because of either the want of jurisdiction or the presence of fraud, it concedes an equity to be due from the orator to the defendants in respect to a part of the taxes which the city levied upon that property. The territorial board assessment per mile was $9,250; the total of miles within the city, $3\frac{7}{10}$; total of assessment for it, $34,225; aggregate of the rates laid by the city on the assessment which it made, .011$\frac{1}{2}$; the orator paid upon the amount so resulting, 363\frac{4}{100}$, which last sum it alleges was the sum of
102 taxes justly and equitably due from it to the city upon a just and lawful assessment of that property; upon these dates that majority hold that the orator should have paid toward those supposed taxes, and on the basis of the territorial board assessment, and according to its own theory 53\frac{18}{100}$ more, therefore in all $416.58; the 53\frac{18}{100}$ thus constituting the unsatisfied equity; but upon those data the orator should have paid, if under any equity in the premises, only $393.59, and its payment was deficient only to the amount of $30.19. The difference in the sum of deficiency does not affect the principle.

If there was an equity there was a deficiency, and the orator is not entitled to relief. But there was no equity. One of the self-evident principles of taxation is that a basis for taxing a completed assessment must exist before a tax can be levied, because a tax is relative; is intended to raise a given amount of revenue; must be laid to produce as nearly as may be a given amount of revenue without excess or deficiency; and the rate
103 must be selected accordingly; hence, the basis must be ascertained before the rate can determine—must precede the rate. The proposition of the existence of the alleged equity assumes that the city had not, and that the territorial board had, the jurisdiction to ascertain the assessment; that the act of December 13th was the only rule upon the subject. Therefore, that rule must be observed before an assessment can result. To produce the result, the portion of the territorial board assessment due to the county must be certified down to it from the board, and out of that proportion the part due to the city must be placed upon its list by the county commissioners, in order that it may authoritatively get there. Until that has been done the city cannot have, and where that has been done the city has, a completed assessment against the company of the property in question. There is no indication in the bill that the

city had received its proportion from the county, or that the
104 latter had received its from the board out of the assessment of 1880. Now, unless it is to be found in the allegation of the orator's claim that the $8363\frac{5}{100}$ paid upon the taxes, fictitiously raised by the city on its assessment, were the amount of taxes justly and equitably due from it to the city upon a just and lawful assessment of the property; but that allegation cannot consistently be held to admit a fact to which it is directly antagonistic. This is the sum of the matter as the case stands before us: When the bill was brought the city had no authoritative assessment against the orator of this property, and neither had attempted to levy, nor could have levied, any tax upon such assessment; that majority has found the existence of a debarring equity against the orator where one cannot be found—that is, in an assessment which is inchoate, and therefore unfit to receive a levy; and in a rate of taxes that the city adopted for, and that was adequate only to its assessment, but which this court applies to an assessment such as if it existed, would be inadequate to the rate yielding
105 less than the requisite revenue; a rate, which, with its assessment, the proposition of this existing equity assumes to be void; so that to find the equity the court makes a rate for the city which the latter is alone competent to make for itself; and, as the court is not a taxing power, its action herein is assumptive and arbitrary. The orator declares that it paid the $8363\frac{5}{100}$ upon taxes laid by the city on its assessments, therefore not upon any laid upon the territorial board assessment. The defendants admit that such was the fact, and the court is bound by it, as the fact, the payment then was made upon taxes that had no legal existence was superfluous, and would have been if it had been a payment of the $8393\frac{5}{100}$, was evidently done in an excess of caution, and the supposed equity does not exist. There would seem to be no room for error on the subject.

WILLIAM WARE PECK,
Justice of Supreme Court.

106 (Endorsed on the back as follows:) Doc. 1. No. 171. Territory of Wyoming. Supreme Court, March term, 1881. The Union Pacific Railway Company, appellee, *vs.* Andrew Ryan and the City of Cheyenne, appellants. Dissenting opinion of Mr. Justice Peck. Filed May 17th, 1881. J. W. Bremer, clerk.

And at our regular March term, 1881 of the supreme court of Wyoming Territory the following order of said court was entered of record on the journal of the court in the words and figures following, to wit:

107 March Term, 1881.

WEDNESDAY, *May 18th*, 1881.

THE UNION PACIFIC RAILWAY COMPANY, Complainant,
vs.
ANDREW RYAN, Marshal of the city of Cheyenne, and THE CITY OF CHEYENNE, Defendants. } No. 171.

And now, on this 18th day of May, A. D. 1881, the same being

one of the days of the March, A. D. 1881, term, of this court, the said complainant, The Union Pacific Railroad Company, appeared in open court, by its solicitor, W. W. Corlett, and prayed the court that an appeal be allowed from the decree, and every part thereof, rendered in this cause by this court on the 17th day of May, A. D. 1881, to the Supreme Court of the United States; and it is ordered, adjudged, and decreed by this court that said appeal as prayed for be be allowed and granted upon the said complainant's executing to the said defendants, within the time required by law, a bond, with good and sufficient security, as required by law, and otherwise in
108 terms as required by law, said bond to be filed in this court and to be approved by the chief justice thereof.

In case the said bond is intended to operate of the execution of the decree herein, the amount thereof shall be $4,000; otherwise the amount thereof shall be $500.00. And in case a supersedeas bond be given in this cause as aforesaid, within the time required by law, upon the appeal herein, then and in that case the execution of the decree herein be, and the same is thereby, suspended until the final determination of this cause by the said Supreme Court of the United States.

And thereafter, to wit, on July 5th, A. D. 1881, there was a bond on appeal filed in this cause, in the words and figures following, to wit:

Supreme Court of the United States.

THE UNION PACIFIC RAILWAY COMPANY, Complainant and Appellants,

vs.

109 ANDREW RYAN, Marshal of the city of Cheyenne, and THE CITY OF CHEYENNE, Defendants and Appellees.

Know all men by these presents, that we, The Union Pacific Railway Company and Alexander H. Swan, of Laramie county, Wyoming Territory, are held and firmly bound unto Andrew Ryan, marshal of the city of Cheyenne, and The City of Cheyenne in the sum of four thousand dollars, to be paid to the said Andrew Ryan, marshal of the city of Cheyenne, and The City of Cheyenne, and their successors and legal representatives, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, administrators, and successors, firmly by these presents.

Sealed with our seals; dated this fifth day of July, A. D. 1881.

Whereas the above-named, The Union Pacific Railway Company, hath taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action
110 by the supreme court of the Territory of Wyoming:

Now, therefore, the condition of this obligation is such, that if the above-named, The Union Pacific Railway Company, shall prosecute its said appeal to effect, and answer all costs and damages

if it shall fail to make good its plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

THE UNION PACIFIC RAILWAY COMPANY, [SEAL.]
By W. W. CORLETT, [SEAL.]
Its Attorney.
ALEXANDER H. SWAN. [SEAL.]

TERRITORY OF WYOMING, } ss:
County of Laramie, }

I, Alexander H. Swan, of said county, being first duly sworn, on my oath, according to law, do depose and say: I am a resident of the said Territory of Wyoming, and am worth double the amount to be secured by the above and foregoing bond, which I have signed as a surety, beyond the amount of my debts. I have prop-
111 erty liable to execution in said Territory equal to the sum to be secured by the said bond.

ALEXANDER H. SWAN.

Sworn to before me and subscribed in my presence, this 5th day of July, A. D. 1881.

JAMES B. SEXER,
Chief Justice of the Supreme Court, Wyoming Terr'y.

The foregoing bond is approved, this fifth day of July, 1881, as required by an order of the supreme court entered May 18th, 1881.

JAMES B. SEXER,
Chief Justice Supreme Court, Wyoming Terr'y.

Endorsed on the back as follows: No. 171. In the Sup. Court U. S. The Union Pacific Railway Company, compl't & appellant, *vs.* Andrew Ryan, marshall of the city of Cheyenne, *et al.*, def'ts & appellees. Bond on appeal. Filed July 5th, 1881. J. W. Bruner, clerk supreme court.

112 And thereafter, to wit, on July 7th, 1881, there was filed in said supreme court an affidavit of amount in controversy in this cause in the words and figures, to wit:

Affidavit of Amount in Controversy in the above Cause

Territory of Wyoming. In the Supreme Court.

THE UNION PACIFIC RAILWAY COMPANY, Complainant,
vs.
ANDREW RYAN, Marshall of the City of Cheyenne, and THE CITY OF CHEYENNE, Defendants.

TERRITORY OF WYOMING, } ss:
County of Uinta, }

I, W. W. Corlett, being first duly sworn, on my oath, according to

law, do depose and say: I am the solicitor for said complainant in the above-entitled cause, and its solicitor in the said Territory. I further depose and say, that the amount in controversy in the
113 above-entitled cause exceeds one thousand dollars.

W. W. CORLETT.

Sworn to before me and subscribed in my presence, this 6th day of July, 1881.

[SEAL.]

J. W. MELDRUM, *Clerk*,
By J. KNIGHT, *Deputy*.

Endorsed on the back as follows: No. 171. In the supreme court of Wyoming Territory. The Union Pacific Railway Company *vs.* Andrew Ryan, marshal of the city of Cheyenne, and The City of Cheyenne. Affidavit of amount in controversy. Filed July 7th, 1881. J. N. Bruner, clerk. W. W. Corlett, sol. for complainant.

114 TERRITORY OF WYOMING, *ss*:

I, J. W. Bruner, clerk of the supreme court of Wyoming Territory, do hereby certify that the foregoing pages contain full, true, and correct copies of the record, all journal entries of orders and decree, opinions, supersedeas bond, and affidavit of amount in controversy in the case entitled The Union Pacific Railway Company, complainant, *vs.* Andrew Ryan, marshal of the city of Cheyenne, and The City of Cheyenne, defendants, so full and entire as the same remains on file and of record in the clerk's office of said supreme court.

In witness whereof I have hereunto set my hand and affixed the seal of said supreme court, this 9th day of September, A. D. 1881.

[SEAL.]

J. W. BRUNER,
Clerk Supreme Court Wyoming Territory.

Costs of this transcript	$39 50
Certificate	1 00
Stationery	2 75
	$43 25

115 TERRITORY OF WYOMING, *ss*:

I, James B. Sener, chief justice of the supreme court of Wyoming Territory, do hereby certify that J. W. Bruner, whose name is subscribed to the foregoing certificate of attestation, now is, and was at the time of signing and sealing the same, the clerk of said supreme court of said Territory and the keeper of the records and seal thereof, and that said clerk was duly appointed and qualified to office as such clerk, and that his official acts as said clerk are entitled to full faith and credit in all courts of record and elsewhere, and that the seal attached to said certificate is the seal of said supreme

court, and that his said certificate is in due form of law, and that his signature thereto subscribed is genuine.

Given under my hand at Cheyenne City, this 9th day of September, A. D. 1881.

JAMES B. SENER,
Chief Justice of the Supreme Court of Wyoming Territory.

Endorsed on cover: Wyoming Territory supreme court. No. 97. The Union Pacific Railway Company, appellant, *vs.* Andrew Ryan, marshal of the city of Cheyenne, and The City of Cheyenne. Filed 14th October, 1881.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1884.

No. ——.

UNION PACIFIC RAILWAY COMPANY

vs.

ANDREW RYAN, Marshal of the City of Cheyenne, and THE CITY OF CHEYENNE.

APPEAL FROM THE SUPREME COURT OF WYOMING TERRITORY.

Brief for Appellant, the Union Pacific Railway Company,

BY

JOHN F. DILLON and
SHELLABARGER & WILSON.

THOMAS McGILL & CO., PRINTERS, WASHINGTON.

In the Supreme Court of the United States.

OCTOBER TERM 1884.

THE UNION PACIFIC RAILWAY COMPANY,
APPELLANT.

vs.

ANDREW RYAN, MARSHAL OF THE CITY OF CHEYENNE, AND THE CITY OF CHEYENNE.

Appeal from the Supreme Court of the Territory of Wyoming.

BRIEF FOR APPELLANT, BY SHELLABARGER & WILSON AND JOHN F. DILLON.

ABSTRACT OF BILL.

This is a suit in equity. The bill was for an injunction restraining the collection of taxes on certain property of the Union Pacific Railway Company, under an assessment made by the city of Cheyenne for the year 1880.

The substance of the bill is as follows:

I. Avers incorporation of the company under acts of Congress of July 1st, 1862, July 2d, 1864, and the consolidation, January 24th, 1880, of the Union Pacific Railroad Company, the Kansas Pacific, and the Denver Pacific; the consolidated company having the name of "The Union Pacific Railway Company," and that it acquired all the property and franchises of the consolidated companies.

II. Avers that under said acts of Congress and others the company was authorized to construct a road from the western boundary of Iowa to its union with the Central Pacific Road, and that it constructed its road between the years 1864 and 1869 from Omaha westward more than a thousand miles, until it united with the Central Pacific, and has ever since been operated in accordance with law, and was duly accepted as such.

III. That the said track was "convenient and necessary" to the due and proper carrying on of the operations of the Government of the United States, one principal purpose of the Government, in authorizing the construction, being to secure transportation for the United States.

IV. Avers the said line was constructed through the city of Cheyenne, the main line being two and two-tenths miles within the said city, and a branch line, owned by the apellant within the city, being one mile in length, and another, formerly the property of the Denver Pacific, a half-mile in length.

V. That said city of Cheyenne is a municipal corporation created under an act to incorporate the city of Cheyenne, which charter and amendments and supplements enumerate the powers of the city government; and said city is made defendant.

VI. Avers that for the year 1880 the complainant made return to the city clerk of its property within the city limits, which return included all of complainant's property subject to taxation for municipal purposes by the city, *except* the "road-bed, superstructure, right of way, and all such structures situate thereon, rolling-stock, side-track, telegraph lines, furniture, and fixtures and personal property belonging to" complainant—this return including a large amount of real estate and improvements thereon belong-

ing to complainant within the city, outside of the road-bed and right of way of the appellant's road.

VII. Avers that John K. Jeffrey, who was city clerk, not acting as such clerk, but pretending to be an assessor of said city, unlawfully and wrongfully assessed the complainant's road-bed, right of way, and all structures situate thereon, superstructures on road-bed, rolling stock, side-track, telegraph lines, furniture, fixtures, and personal property of complainant for the purposes of the said city for 1880; and the bill then enumerates the property so assessed and valued by the said clerk, and the values at which it was so appraised and assessed, to wit:

4 miles of main track, road-bed, &c., $8,000 per mile	$32,000
4 miles of side-track, $4,500 per mile	18,000
1 railroad hotel	10,000
1 passenger depot and appurtenances	12,000
1 freight depot and appurtenances	12,000
1 round-house and appurtenances	25,000
6 dwelling-houses (frame)	3,000
1 express office and furniture	1,000
Water and wood depot and appurtenances	2,000
Telegraph lines	1,000
1 mile road to military depot	4,500
Proportionate value of rolling-stock in Cheyenne as terminus	100,000

Also, that said Jeffrey wrongfully and unlawfully, and without jurisdiction, assessed for 1880, as assessor, and not as city clerk, other property, to wit:

1 brick freight depot and office	$1,200
1 wood passenger depot	800
1 frame building on main track U. P.	200
Main track, half mile, at $500	2,500
Rolling-stock, proportionate value in Cheyenne as terminus	10,000

This last-named property was formerly the property of the Denver Pacific Company.

VIII. Avers that this property attempted to be assessed by said city clerk for 1880 is the road-bed, superstructure, right of way, structures thereon, rolling-stock, side-track, and telegraph lines of complainant's company, and was subject to assessment for the purposes of Cheyenne city for the said year 1880 by "the territorial board of assessment of Wyoming Territory," by virtue of an act entitled "An act in relation to the assessment of railways and telegraph lines," approved December 13th, 1879, and is assessable for the purposes of taxation by the said city *only* by said territorial board; and avers that said Jeffrey made return of his assessment to the city council of Cheyenne, making oath to its correctness, and that said Jeffrey had no jurisdiction to make said assessment or any part thereof, and that his said acts were "null, nugatory, void, and fraudulent."

IX. Avers that said city council to which said return was made unlawfully, wrongfully, and fraudulently pretended to correct and equalize said Jeffrey's assessment, and returned their correction to said Jeffrey, and said correction was that they assessed—

2 miles of main-track, road-bed, &c., main line, $8,000 per mile	$16,000
6 miles of side-track, $5,500 per mile	33,000
Rolling-stock, proportionate value used on Colorado Central Road	7,500

—that said council left the other items as returned by Jeffrey; that such council unlawfully, wrongfully, and fraudulently pretended to correct the return by Jeffrey aforesaid of the Denver Pacific property, so that, as equalized and corrected, it was as follows:

1 wood passenger depot..... ..... $600
Rolling stock, proportionate value in Cheyenne, terminus..... 17,000

—and left the other items of Denver Pacific property as returned by Jeffrey; that after said corrected assessments had been returned to Jeffrey, on the 8th of June, 1880, the said council of Cheyenne passed an ordinance levying taxes for 1880, such levying being upon real and personal estate of the said city, according to the assessed value, six mills for general revenue purposes not otherwise provided for, two mills on the dollar for improvements of streets, &c., and three and one-half mills for payment of interest on bonds.

X. Avers that said pretended assessments were grossly unfair, unjust, and unequal, both as returned and as corrected; that said assessed values were higher than values on property of other persons and corporations, and were made fraudulently, as before averred, and "for the fraudulent purpose and intent, on the part of the said city authorities, to make complaint, pay unjust and undue proportion of taxes, and the assessments were not made upon any evidence, but were made under the influence of prejudice and hostility." (Record, pp. 4, 5.)

XI. Avers that, at date of said assessment, complainant was not assessable for proportional value of rolling-stock on said Colorado Central; that Colorado Central was and is owned by a separate corporation, created under Wyoming laws, and its road did not extend into said city limits, and never did; that the city council had no authority to assess $7,500 against orator for rolling-stock of said Colorado Company. (Record, p. 5.)

XII. Avers that said assessments are exorbitant and unjust, in the particulars specified, to wit:

Road-bed of appellant assessed at $8,000 per mile, while its assessable value is not over $6,000 per mile.

Side-track assessed at $5,500 per mile, not assessable at over $2,000 per mile.

Round-house assessed at $25,000, its assessable value being not over $15,000.

Proportionate value of complainant's rolling-stock assessed at $100,000, and the proportion justly belonging within or apportionable to Cheyenne worth far less than the value so assessed.

XIII. Avers that said Jeffrey, immediately after said ordinance passed, made out a tax-list in complainant's name, and entered thereon, lands in one column of list, and value in another column, against name of the appellant, and in another column entered opposite to the name of the appellant total valuation of personal property, and extended said lists as follows:

Lots and lands, general revenue taxes	$132 30
City bond tax	77 18
Street and alley tax	44 10
Total	253 58

On personal property:

General revenue tax	$1,199 40
City bond tax	699 65
Street and alley tax	399 80
Total of personal property, Union Division	$2,098 85

U. P. Railway Company (for Colorado Central).

General revenue tax	$45 00
City bond tax	26 25
Street and alley tax	15 00
Total claimed on account of said assessment of rolling stock of Colorado Central	$86 25

Union Pacific, Kansas Division.

General revenue	$130 15
City bond tax	75 93
Street and alley tax	43 38
Total taxes claimed for Kansas Division	$249 46
Grand total of taxes claimed for 1880 on account of divisions in said city upon all property within the city	$2,888 14

—$86.25 being for said assessment of rolling-stock of Colorado Central.

XIV. Avers that said clerk attached a certificate to said tax-list, for said year, certifying that the same was correct, as per assessment roll—was a correct account of the several taxes levied by city council; and said clerk attached a warrant under his and corporate seal, directed to the collector of the city, requiring him to collect said taxes and to return the same within ninety days from date, June 22d, 1880.

XV. Avers that said clerk delivered warrant to Andrew Ryan, marshal of the city, who is made defendant.

XVI. Avers that all the proceedings above set forth were taken in virtue of pretended ordinance, entitled "An ordinance concerning assessment, levying, and collecting of taxes of the second of June, 1880," passed by said city council.

XVII. Avers that complainant paid said marshal, as taxes of said city for 1880, all taxes justly due; paid on September 16th, 1880, to said Marshal Ryan, $253.58, full amount of taxes claimed by city of complainant for said year upon said lots within the city, and paid, on same day, to said Ryan, the further sum of $363.40, total amount of

taxes justly due for said year to said city from complainant upon a just and lawful assessment of "orator's road-bed, superstructure, right of way, and all structures thereon, rolling-stock, side-track, telegraph lines, furniture and fixtures, and personal property belonging to the orator, and that complainant holds Ryan's receipt therefor."

XVIII. Avers that "the territorial assessment board" of said Territory, pursuant to said act of Territorial Legislature (December 13th, 1879,) assessed complainant's "road-beds, including superstructure, right of way, and all structures situate thereon, rolling-stock, side-track, telegraph lines, furniture, fixtures, and personal property belonging to complainant, for said year 1880, at $9,250 per mile; avers that complainant's road-bed, in said city, at said valuation of $9,250 per mile, should have been assessed, for taxation by the city, at $29,600, and the other property of complainant in said city (not including its real estate) was assessed at $2,000, making total valuation of complainant's property in the city by said territorial assessment board $31,600; that said payment of $363.40, paid to Ryan, constitutes full amount of taxes justly due to Cheyenne for 1880, exclusive of the tax on lots and agricultural lands *outside* of right of way of road in the city.

XIX. Avers that Ryan, marshal, threatens to enforce collection of the said taxes assessed by Jeffrey, not immediately paid for said year 1880, to wit, said full amount of $2,888.14; that he will enforce payment thereof under said warrant by seizing complainant's property in Cheyenne, whether real or personal, as most convenient and best calculated to compel payment; and charges that Ryan, under said warrant, will levy on complainant's engines and cars, part of complainant's rolling-stock on said road, and necessary to its operation, so as to compel payment of said taxes—this unless Ryan is restrained by court.

XX. Avers this threatened injury irreparable, because it would prevent full enjoyment of franchise under acts of Congress—would prevent company from executing its obligations to the United States, and cause irreparable injury, because said assessment is made a lien upon all real property in Cheyenne, and casts a cloud on title; that, besides said road-bed, right of way, &c., complainant has, in said city, a large amount of real estate, laid out in lots, now being sold in market, and that said illegal tax, so assessed and constituting a lien on said lots, casts a cloud on title thereof, depreciates their value, and prevents realizing fair value, on lots, by sale.

XXI. Alleges there is no adequate remedy at law if complainant is compelled to pay the tax and rely on recovering it back by action at law, because of the fact that it owns considerable portion of the property in Cheyenne, assessable for taxes, and, hence, that, if complainant obtain a judgment at law, its property would be required to pay a large proportion of the judgment.

XXII. Avers that said Kansas Division embraces the property formerly owned by Denver Pacific Company, and that Union Division of Union Pacific embraces the property formerly belonging to Union Pacific Railroad Company.

XXIII. Avers that complainant is willing to do equity, and offers to pay said city whatever court may direct for said year; and further avers that complainant is compelled to go into equity to prevent siezure and sale of its property upon said pretended and illegal exactions, to avoid being involved in a multiplicity of suits with the various purchasers of said lots, and avoid having the title of such lots clouded by such lien, and to avoid having its franchises injured by said illegal tax assessments.

XXIV. Avers that it has requested defendants to refrain from collecting said illegal tax, and that they threaten to make collection.

XXV. Avers that said Ryan and said city confederate with unknown persons (who, when discovered, are asked to be made parties) to wrong and injure complainant, and that said Ryan and said city refuse to comply with the request to refrain from said collection; and that such confederates, at times, pretend that said taxes are justly due, and at other times allege that complainant is bound to pay said taxes whether just or not; whereas complainant charges that the taxes are not justly due, and complainant not bound to pay them whether just or not just; and that, if complainant is compelled to pay, it would have no remedy at law, and would be involved in multiplicity of suits, and that the taxes cast a cloud upon complainant's title to real estate in said city.

PRAYER OF BILL.

1. Prays that Ryan, and the city, and their confederates, when discovered, make answer to the matters charged in the bill, both as to the best of their knowledge, and the best of their information, hearsay, and belief.

2. That said taxes claimed be adjudged void; and that said assessment of said railroad, right of way, and improvements thereon, and rolling-stock within the city, may be adjudged void; that the assessment may be cancelled; that it may be adjudged that complainant's property in said city be decreed freed and discharged from all lien for said taxes.

3. That defendants and their successors be restrained by temporary injunction from proceeding to collect said taxes, or any part, by restraint or otherwise.

4. And upon final hearing that defendants be enjoined from proceeding to enforce payment of said taxes.

5. And that complainant may have other and further relief.

Demurrer to Bill.

The two defendants—Ryan and the city of Cheyenne—demurred generally to the bill. (Record, p. 15.)

Decree.

The District Court rendered a decree, adjudging that the tax-list named in the bill, and in the warrant, and all proceedings theretofore had, on these, by the defendants, were void, and the same were, by the decree, annulled and vacated, and the defendants perpetually enjoined from all attempts to execute the warrant and force the collection of any taxes. (Record, p. 16.)

Appeal and Decree of the Supreme Court of the Territory.

The case was appealed to the Supreme Court of the Territory, and at the March Term, 1881, the Supreme Court reversed the judgment of the District Court, and remanded the case, with instructions to dissolve the injunction, and dismissed the bill without prejudice. (Record, pp. 17 and 18.)

The Railway Company Appeals from this Decree.

Assignment of Errors.

The appellant assigns, as error apparent on the record in this case, and involved in the decree of the Supreme Court of the Territory of Wyoming, the following:

1. The court erred in holding that the act of the Territorial Legislature, which is named in the said bill of complaint, and entitled "An act to incorporate the city of Cheyenne," and the acts amendatory and supplementary thereto, were not superseded and repealed, so far as they relate to the taxes or the assessment of taxes involved in this suit, by the act of said Territorial Legislature named in the said bill of the 13th of December, 1879, and the court erred in holding that said last-named act did not apply to the city of Cheyenne.

2. The court erred in holding that the last-named act of December 13th, 1879, was not the *only* act under which taxes of the description enjoined and declared void by the said decree of the District Court were assessable and collectable.

3. The court erred in holding that the act entitled "An act to incorporate the city of Cheyenne, and the acts amendatory thereof, and supplementary thereto," were the acts under which the taxes, upon the property of the complainant, of the kind described in the bill, and as to which the said injunction was asked, were assessable for the year 1880.

4. The court erred in holding that the said city clerk (Jeffrey) and the said city council had jurisdiction to assess, value, levy, and collect the taxes so enjoined by the decree of the District Court.

5. The court erred in holding that the said marshal (Ryan) had jurisdiction, or authority, under the warrant to him issued, to collect the taxes so enjoined by the said decree of the District Court.

6. The court erred in holding that the said taxes so enjoined by the said District Court were lawfully assessed, returned, and collectable.

7. The court erred in holding that the bill of complaint demurred to did not sufficiently show or set up the readi-

ness and tender on the part of the complainant to do equity in regard to the subject-matter of said taxes.

8. The court erred in sustaining the said demurrer to the bill of complaint.

9. The court erred in rendering the said decree reversing the judgment of the District Court.

STATUTES OF THE TERRITORY.

The following are copies of the acts of Wyoming Territory which are brought into view in the present case.

(Laws of Wyoming, Chapter 14, page 30.)

CITY OF CHEYENNE—AMENDMENT TO CHARTER.

AN ACT to amend an act entitled "An act to incorporate the city of Cheyenne," approved December 14th, 1877.

Be it enacted by the Council and House of Representatives of the Territory of Wyoming:

SECTION 1. That section twenty of said act be amended so that the first division of said section (the same commencing on the last line of page forty of the Session Laws of 1877) shall read as follows: To levy and collect taxes for general revenue purposes, not exceeding six mills on the dollar in any one year on all real, personal, and mixed property within the limits of said city, taxable under the laws of the Territory; and the assessment, levy, and collection of all taxes shall be made as may be provided by ordinance; and for the purpose of compelling payment of taxes, the said city shall have power to enforce the same by distress and sale of personal property of the person assessed, except such as is exempt from taxation, and in such case the tax-list shall be a sufficient warrant for such distress, and every tax levied by said city and due upon personal property is hereby made a lien upon the real property of the owners thereof, and every tax levied and due upon real property is hereby made a lien upon the property assessed from and after the date of the levy of such tax;

and the city collector of taxes is empowered to sell lands upon which there may be a lien for taxes, and convey the same to the purchaser in manner as may be provided by ordinance, and said city may by ordinance provide for attaching a penalty of ten per centum to all delinquent taxes.

(Laws of Wyoming, Chapter 6, page 13.)

Act approved December 13th, 1879.

ASSESSMENTS OF RAILWAY AND TELEGRAPH LINES.

AN ACT in relation to the assessment of railways and telegraph lines.

Be it enacted by the Council and House of Representatives of the Territory of Wyoming:

SECTION 1. The president, secretary, superintendent, or other principal accounting officers of any railroad or telegraph company having property in this Territory, at the time of the assessment of every railroad and telegraph company, whether incorporated by any law of this Territory or not, when any portion of the property of said railroad or telegraph company is situated in more than one county, shall list for assessment and taxation, verified by the oath or affirmation of the person so listing, all the following-described property belonging to such corporation within the Territory, viz.: Road-bed, superstructure, right of way, and all structures situated thereon, rolling-stock, side track, telegraph lines, furniture and fixtures and personal property belonging to such corporation. Such list shall contain—first, the number of miles of such railroad or telegraph line in the Territory of Wyoming, and the number of miles of the same in each organized county therein; second, and such return shall be made to the auditor of the Territory on or before the first day of July, annually. If the return aforesaid be not received by said auditor by the third day of July, he shall thereupon proceed to obtain the facts and information aforesaid, in any manner that may appear most likely to secure the same correctly, and for that purpose may address a written communication to the corporation, or to some officer of the corporation who has failed or refused to make the return aforesaid.

As soon as practicable after the auditor has received said return, or procured the information required to be set forth in said return, a meeting of the territorial board of equalization, consisting of the governor, territorial treasurer, and auditor shall be held at the office of said auditor, and the said board shall then value and assess the property of said corporation, for each mile of said road or line, the value of each mile to be determined by dividing the sum of the whole valuation by the number of miles of said road or line. In making up such valuation or assessment the said board shall examine and consider the return herein required to be made, or the information procured by the auditor in default of such return, together with such other reliable information relative thereto as they may be able to procure; said board shall not assess the value of any machine shop or repair shop, or other buildings not situated on said right of way or grounds or other real estate of any corporation or company within this Territory; but it shall be the duty of the assessor of the county or district in which said machine or repair shops, or other buildings, or grounds, or other real estate is situated, to assess the same, and make return thereof in the manner now provided for the assessment and return of real estate. On or before the first Monday of August, or so soon thereafter as the said board, or any two thereof, shall have made and determined said valuation and assessment, the territorial auditor shall certify to the county clerks of the several counties in which property of the aforesaid corporation, or any part thereof, may be situated, the assessment per mile so made on the property of such corporation, specifying the number of miles and amount in each of such counties; the county commissioners shall thereupon divide and adjust the number of miles and the amounts falling within each precinct, township, or school district, in their respective counties, and cause such amounts to be entered and placed on the lists of taxable property returned by the several assessors. The auditor shall certify whether a return was made to him by such corporation, or proper officer thereof, or whether the information required in and by such returns was procured by himself; and in case the return was not made as required by this act, or, being made, was not sworn to, it shall be the duty of the county commissioners to add any amount not exceeding ten per cent. to the valuation thus brought before them.

ARGUMENT.

The contentions of the appellant in the court below in support of the sufficiency of its bill, and in resisting the demurrer, were—

1. That the assessment of the taxes, the collection of which was restrained by the decree of the District Court, to wit, the taxes on the main track and road-bed, the side-track, the road to the military depot, the railroad hotel, the depot and appurtenances, the round-house and appurtenances, the dwelling-houses, the express office and appurtenances, the water and wood depot and appurtenances, the telegraph poles, the proportionate value of rolling-stock, the freight depot and office, the passenger depot and frame building on main track of Union Pacific, the rolling-stock of the Colorado Central, could only be made under the act of December 13th, 1879, in relation to the assessment of railways and telegraph lines.

2. That in any event the so-called assessor of the city had no authority to make the assessment, because no such officer as city assessor was provided for in the city charter.

3 That the assessment was grossly unfair, unjust, and unequal, and was fraudulently made, with the fraudulent intent of making the appellant pay an unjust proportion of taxes.

4. That a proportion of the taxes was levied on the property of another corporation, viz., the Colorado Central Company, and did not belong to complainant, but belonged to the Colorado Central, and its property was not within the city limits.

It will be observed from this statement that *one of the main questions in the case* is, whether the act of the 13th of December, 1869, in relation to the mode of assessment or

valuation of railways and telegraph lines for the purposes of taxation, superseded, and, as to property of the description involved in the present case, repealed to this extent the act incorporating the city of Cheyenne and the acts amendatory thereof. If it did effect such repeal, then we suppose it will be admitted that the bill of complaint is good, and that the decree of the Supreme Court below must be reversed.

JURISDICTION IN EQUITY.

In the present case the bill discloses ample ground for the interference of a court of equity. It shows that it would involve the plaintiff in a multiplicity of suits as to title of lots laid out and being sold; would prevent their sale; would cloud the title to all real estate; would prevent the operation, by seizure, of rolling-stock, of the railroad; would prevent the complainant from complying with its statutory obligations to the United States; would impair the corporate franchise as to the operation of the road generally, and work other irreparable injury.

Were this a "State" tax, instead of a mere municipal tax, it would still be within the language of this court, where, in Dows *v.* Chicago, 11 Wall., 109, and Hennewinkle *v.* Georgetown, 15 Wall., 549, when speaking of enjoining "State" taxes, and stating when injunctions will be allowed, the court says:

"There must exist special circumstances bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, when the property in real estate, would throw a cloud upon the title of the complainant."

But in a case of a tax by a city, or other municipality, this court approves (2 Otto, 615) what is stated by "High on

Injunctions," as a distinction between "State" taxes, and taxes by municipal corporations, where the author says:

"A city assessment without authority of law will be enjoined even where no question as to cloud of title is raised."

Foster *v.* Kenosho, 11 Ark., 116.

Toledo and Others *v.* Lafayette, 22 Ind., 262.

Mayer *v.* Porter, 8 Md., 284.

Repeal.

There was not, in the court below, any question made that the case was not one for the exercise of equitable jurisdiction; and we therefore will not further allude to this point; and we turn to the question, Does the act of December 13th, 1879, supersede and repeal the provisions of the city charter and their amendments, so far as respects the mode of assessing or valuing for assessment property of the kind in question?

It seems to us that this is not a question of serious doubt. We will first direct the attention of the court to various reasons in support of the proposition that the act of 1879, to the extent suggested, supersedes the city charter and its amendments.

For this purpose we now turn to an inspection of this act.

1. The *express words* of the act make this law apply to "*any* railroad or telegraph company having its property in this Territory." This language thus far, therefore, takes in every railroad in the Territory expressly and explicitly.

2. It then adds these words: "whether incorporated by any law of this Territory or not." That shows care and solicitude to make the law embrace *every* railroad in the Territory, with the exception stated next; as it is aimed at exactly *such* railroads as the Union Pacific, *not* incorporated by the Territory.

3. Then, again, to this is added the further provision, "when any portion of the property of said railroad or telegraph company is situate in more than one county." This shows a continued solicitude to make it definite, exact, and unmistakable, that *every* railroad in the Territory was included, with an exception, that exception being that the road must be one extending into more than one county.

The result, then, of these clauses of the section, is that, if a triple provision, expressly and literally defining and covering every railroad in the State of every description as coming within the law, except those confined to a single county, can be made to take in this railroad, then the appellant's railroad is embraced within the act of December 13th, 1879.

Then next notice the general character of the provisions of the section in detail. The provision is that the officers of every such railroad in the Territory, whether incorporated by the territorial laws or not, which extends into more than one county, shall list for assessment and taxation "the road-bed, superstructure, right of way, and all structures situate thereon, rolling-stock, side track, telegraph line, furniture, and fixtures and personal property, giving the number of miles of the line in the Territory, and the number of miles in each county." This return is to be made to the auditor of the Territory before the 1st of July, annually. If not so made, by the officers of the corporation, then by the auditor, by the 3d day of July; and he is required to obtain the requisite information, and "the territorial board of equalization" is required to meet at the auditor's office, and TO VALUE AND ASSESS the property of the corporation for *each mile* of the road, by dividing the whole value of the property by the number of miles *in the Territory*. In making the assessment, this State board is required to exclude from assessment any machine shop or repair shop or other building *not* situate on the right of way, or grounds or other real estate of the corporation.

"But the assessor of the county or *district* in which such machine or repair shops, or other building or grounds or other real estate is situate, is required to assess such property, excluded from assessment by the State board; and such assessor of the county or district is required to return these excluded assessments in the manner now provided for the assessment and return of real estate."

It is then further provided, in this section, that, on or before the first Monday in August, or as soon thereafter as the State board shall have made and determined the valuation and assessment, "the territorial auditor" shall certify to the county clerk of the several counties in which the property of the aforesaid corporation, or any part thereof, may be situate, the assessment per mile so made on the property of the corporation, specifying the *number of miles* and the amount in *each* of said counties. Then the county commissioners are required, thereupon, "to divide and adjust" the number of miles, and amounts falling within *each precinct, township, and school district in the respective counties*, and to cause such amounts to be *entered and placed on the list of taxable property returned by the several assessors.*" This scrutiny of this section, in detail, shows unmistakably a purpose on the part of the Legislature to make this assessment of the "territorial board" a complete revision of the territorial laws for the assessment and valuation of all railroad property covered by it and within the territory, where the road extends into more than one county. This is made plain by the following considerations, in addition to the one that the law, as above stated, explicitly and unmistakably covers all:

1. This intent to supersede all county and city valuations for taxation of the property embraced by this section as assessable by the "territorial board" is shown by the fact that it selects out for taxation only *such* railroad property as, in its nature, is a unit, and is not divisible

into sections by reason of their belonging to a railroad, which, in its operation, use, and nature is a unit, all the parts of which are essential to the use, value, and enjoyment of the whole as an integer; and it places this, and this only, under *one* assessment by the "territorial board" as such indivisible unit.

The property so segregated and handed over to the jurisdiction of the territorial board is only the road-bed, superstructure, right of way, and all structures *situate thereon*, and the rolling-stock, side track, telegraph line, furniture, fixtures, and personal property belonging to the corporation.

The same thing is again shown in the provision prohibiting the territorial board from assessing any machine shop, repair shop, or other buildings not situate on the right of way or grounds or other real estate of the corporation, and making it the duty of the assessor of the county or *district*, in which such excluded machine or repair shops or other buildings are situate, to assess and return these, as provided for the assessment of real estate generally.

These provisions giving to the territorial board the power to value all property of this class as a unit or integer, and making it assessable by the territorial board, and the other giving all property not so "*pertaining*" to the line, assessable as other real estate, by the assessor of the county or "district," show conclusively that the *entire line*, and its appurtenant property, was looked upon, and dealt with, by the law, as a unit, and not to be valued for taxation in sections or parts and by local or municipal subdivisions.

Again, the same purpose conclusively appears, touching property which the act deals with as a unit, by the clause which, after providing for its valuation as a unit, directs such valuation to be *apportioned* to the various counties, by ascertaining the value, per mile, of the entire property assessable by the territorial board, and requiring the territorial auditor to certify to the clerks of the counties in

which the road, or any part thereof, may be, this mileage valuation, giving the number of miles in each county, and further requiring the county commissioners to adjust the number of miles, and the amount of taxes falling within each "*precinct, township, and school district in their counties*," and further requiring these amounts so divided to the several precincts, townships, and school districts to be placed on the list of taxable property returned by the several assessors.

This provision, therefore, of the act of December 13th, so providing as to the property in question, is special, complete, and, as contrasted with the mode of assessment in the city charter of Cheyenne, a totally *different* system, mode, and instrumentality for making valuation; is one which solicitously and undeniably accords, and, through the return to the county commissioners, secures, to each county and subdivision thereof, its share of taxation upon such railroad property for each year.

True it is that the territorial board, under the act of December 13th, does not, itself, make levy of or collect the tax assessments. The actual assessment and collection is made through the local officers.

The act of December 13th simply provides for and secures, by one board of valuation, a *valuation* of all the property in question, and secures its being placed upon the tax-list of each county and each taxing precinct of the county, including cities.

The court will find the history of the legislation of Wyoming, on the subject of railway taxation, very clearly stated in the dissenting opinion of Judge PECK, Record, p. 23 *et seq.*

The ability with which that judge discusses the questions involved will not fail to attract the observation of your honors.

From that opinion it appears that, down to the act of 1879, railway property had been assessed and valued by

each local body authorized to value and assess property generally, which, of course, confined the valuation and assessment to such part of the railroad as was within the geographical limits of the particular local civil subdivision of the Territory. Rolling-stock could not, under this system, be valued and assessed at all, or, if at all, arbitrarily. The road-bed and appurtenances would be valued and assessed by each city and county and taxing district for itself, and, of course, there would be no uniformity in any county or in different counties.

Now, the object and purpose of the new act, instituting for Wyoming a new policy, but one which experience had before led many, if not most, of the older States to adopt, was to provide, not a new system of taxation of railway properties throughout, but a new, uniform, and exclusive mode of *valuing for purposes of taxation* all railway property connected with the operation and use of the road, leaving their *outside* property to be valued for taxation as before.

The scheme of the new act is plain, and its purpose is obvious. The territorial board is empowered to obtain the necessary information as to values, and is then required "TO VALUE AND ASSESS" the property and certify the result to the counties, and the counties to the various taxing districts and precincts; which result stands as the basis of valuation on which the various local taxes authorized by law are to be levied.

What reason can be given why the old system should be retained as to *cities*, in respect of municipal taxes, but abolished and superseded as to all other local civil subdivisions of the State? And even in cities, so far as they constitute townships, school districts, or parts of the county, the valuation of railroad property, fixed by the board, constituted by the new act, would confessedly govern.

Thus there is secured, by the scheme of the act of December 13th, to every county and every taxing precinct thereof, including cities, their share of the taxes upon this

railroad property so dealt with by the law as an indivisible unit; and any construction of this law, and of the city charter, which would suffer the territorial board, first to value and to have returned to, and placed upon, the tax-list of each county and each city thereof, this property for taxation, for all territorial, county, school district, and "precinct" purposes, and then would suffer these subdivisions of the counties, including city precincts, to value and assess this property over again, and thus secure to the cities a double taxation, would reduce the law to the absurd and flagrantly unjust.

The result of these features of the law of December 13th, therefore, is to show that it was designed, as to all classes of property which it makes a unit, and which it values for assessment by the territorial board and places upon the tax-lists of the cities and other taxing precincts, to be a *revision and substitute* for *all* valuations, and for all assessments and collections thereon, to which the particular property in question is subjected.

It will, of course, be observed that we are not saying that this act of December 13th actually made assessments and collections of taxes. Its province was to make *valuation*, and to return such valuation in the mode therein prescribed.

And it (the act of December 13th) placed in the hands of the county officers this valuation, and under this valuation this property is placed upon the tax-lists of the counties, and of all the taxing precincts thereof, including cities; and the actual assessments and collections are made by the local officers under other laws than that of December 13th.

This brings the law of December 13th, therefore, within the rule of interpretation, which says:

"That even where there is no direct repugnance between the later law and the earlier one, claimed to be repealed, yet where the later law is designed to be a revision of an entire subject-matter, or a substitute for a whole, or in a

distinct and separable part of an earlier law, then there is a repeal of the earlier law, notwithstanding the absence of necessary repugnance."

Or, stating the same thing in the language of this court, (quoting from Davies *v.* Fairbrain, 3 How., 643,) this court says:

"If a subsequent statute be not repugnant, in all of its provisions, to a prior one, yet if the later statute clearly intended to prescribe the only rule which shall govern, it repeals the prior one."

Applied to this case this means that, if the law of 1879 intended to prescribe the one rule of valuation of railroad property, for taxation, which shall govern and be in force in regard to railroad property situate on its right of way and appurtenant to its operation, then it repeals the city charter, at least to the extent that it enables its officers to determine such valuation. (State *v.* Stoll, 17 Wallace, 431.)

Stated in still other words, this court expresses the same rule when it says—in Murdock *v.* City of Memphis, 20 Wall., 617, speaking of the question whether the second section of the act of 5th of February, 1867, (14 Stats., 385,) amending the judicial act of 1789 as to the removal of cases from State Courts to the Supreme Court—

"It was their intention to make a new law, so far as the present law differed from the former, and that the new law, embracing all that it was intended to be preserved of the old law, and omitting what was not so intended, became *complete in itself*, and repealed all other law on the subject embraced within it. The authorities on this subject are clear and uniform."

The same thing is in Henderson's Tobacco, 11 Wall., 657, where the court says:

"Even where two acts are *not* in express terms repugnant, yet if the latter act covers the whole subject so as to

embrace new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act."

This language is cited from the case of—
United States *v.* Tynen, 11 Wall., 692.

It is of course needless to multiply citations upon a rule so familiar. Applied to the present point, these cases mean that since it is plainly and expressly disclosed, by the act of December 13th, 1879, that, as to all rolling-stock of railroads, and as to their "road-bed, superstructure, right of way, and all other structures situate thereon, side track, telegraph lines, furniture and fixtures and personal property belonging to the corporation," it was the purpose of the Legislature to substitute a new mode of valuation of railroad property for taxation for all purposes—territorial, county, township, school, and city— therefore the act of December 13th supersedes and repeals the city charter so far as that authorizes the city officers to value and assess such railroad property for the purpose of taxation. That this legislation of December 13th, 1879, and the act amendatory of the city charter of Cheyenne, approved December 14th, 1877, do embrace, to the extent of the property described in the act of December 13th, 1879, the same property, is incapable of denial or doubt. The act approved December 13th, 1877, commands, expressly, that the taxing therein authorized shall be upon "*all real, personal, and mixed property within the limits of the city* taxable under the laws of the Territory."

This, therefore, takes in the property named in section 1 of the act of December 13th, to wit, the property of every railroad, however incorporated, when any portion of the property of said railroad or telegraph line is situated in more than one county, "which consists of road-bed, superstructure, right of way, all structures situate thereon,

rolling-stock, side track, telegraph lines, furniture and fixtures, and personal property belonging to the corporation."

This act of December 13th, 1879, further specifies what shall be embraced in the "lines" of the railroad which it taxes; because it says that, in making the assessment, the officers shall return "the number of miles of such railroad and telegraph line in the Territory of Wyoming, and the number of miles in each organized county therein." Thus, then, it is made undeniably plain and express that, under *this* act of December 13th, 1879, the return must embrace *every mile* of railroad line in the Territory, whether within the limits of cities or not.

We have it therefore fixed in the case that these two acts do embrace and cover, to the extent above stated, the *same* property, and require the *entire* amount and description of the property, so embraced in *both* systems, to be taxed under both, if both were meant to "stand together" and be operative at the same time. We are therefore driven to the inquiry, whether the latter act was intended to be a revision of, and a substitute for, the act of November 26th, 1879, to the extent of the property to be "valued and assessed" by the board under the latter act of December 13th.

We have stated above that the act of December 13th, 1879, was intended to be a revision of and a substitute for that of November 26th of the same year; and that even if there were no repugnancy between the two, yet, since the latter act was meant to be a revision of and a substitute for that of November 26th, therefore the latter act would work a repeal of the former, even in the absence of such repugnancy.

The Two Acts Repugnant.

But we now proceed to show that the repugnancy between the two is palpable, direct, and unavoidable. In considering the question whether the two acts are repug-

nant, so that they cannot stand together, some familiar rules for interpreting statutes will, by the court, be kept in mind. One is that statutes *in pari materia* are construed as one act. Another rule of interpretation applicable to the present inquiry as to whether the two statutes are repugnant, and whether one was meant to repeal the other, in so far as repugnancy is found to exist, is the fundamental and salutary one which is laid down in the case of the United States *v.* Kirby, (7 Wall., 486,) where this court says:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or absurd consequences. It is always, therefore, presumed, as the Legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

Guided by this rule of interpretation, we turn, therefore, to the question, whether the two statutes are repugnant, and whether, therefore, the later repeals the earlier one to the extent of the repugnancy. We have already seen that the two acts do cover, to the extent above indicated, the same identical property, and our inquiry becomes, therefore, this, to wit: To what extent would injustice, absurdity, and direct contradiction and clashing of provisions result from allowing both statutes to stand and be operative at the same time upon the same property?

First notice the injustice and absurdity of holding that these two acts shall "stand together," when one (that of December 13th) expressly values *every* mile of road in the Territory, whether within cities or not, and also every appurtenance of *every* mile. Then it divides that aggregate value by the aggregate of all the *miles* in the Territory, whether these miles are in cities or not. Thus it gets the average mile value of every rod of line in the

Territory, and on *that* it assesses the tax, and divides this tax to *every "precinct"* in the Territory.

Then, if the act of November 26th is also to stand, it taxes, or values for taxation, on a totally different principle, *some of the same miles;* and this by a totally different set of officers.

In other words, it is impossible to execute this act of December 13th, without including the miles of railroad situate within the city limits. Hence, as the miles within the city limits cannot be excluded in executing the act of December 13th, they must be taxed under that act.

Again, it is expressly required, under this act of December 13th, that the auditor, after the territorial board has ascertained the value per mile of the entire property assessable under this act, shall "certify to the county clerks of the several counties, in which property of the aforesaid corporation or any part thereof may be situate, the assessment per mile so made on the property of such corporation, specifying the number of miles and the amount of each in said counties."

Thus the county clerk of *every* county is *put in possession of the aggregate value of the entire property taxable under this act, and also the average mile-value of every mile in the Territory, whether situate in cities or not.* Then this act of December 13th requires the county commissioners "thereupon to divide and adjust the number of miles and the amount falling within each precinct, township, and school district in their respective counties, and to cause such amounts to be entered and placed on the list of taxable property returned by the several assessors." Thus we have it fixed, again, upon this law, that this *entire* property, so taxable under the act of December 13th, *is distributed* and placed upon the list of taxable property, as returned by the several local assessors of the counties, of every taxing precinct, township, and school district.

The result, therefore, is that this entire property, taxable

under the act of December 13th, is put upon the list of taxable property for every precinct, township, and school district in every county. In other words, every tax precinct, township, and school district *gets the benefit of the general railroad tax assessed under the act of December 13th.*

All this is, thus far, undeniable, and we are therefore brought, by these considerations, to the direct question, whether it was *designed* that every tax precinct, township, and school district should once receive the benefit of a taxation of the property covered by the act of December 13th, such tax being *at the full* value of the property and *equal to the general taxes paid by all other property in the Territory;* and that these several tax precincts, townships, and school districts should share equally with all other portions of the Territory in this tax, so assessed under this act of December 13th, and then be allowed to *again* tax the same property at its full value? That the word "precinct," as found in section 1 of this act of December 13th, means "tax precinct," was not denied below, and is obviously true. Therefore this clause, in that act, requires that each tax "precinct" shall share in the taxes assessed under this act of December 13th. Therefore *cities*, being tax precincts, are brought within the words of this act, "each precinct." Thus it is established that, under the act of December 13th, each *city* participates in the tax so "divided and adjusted" and placed upon the lists of each precinct, township, or school district.

Now, then, we repeat the inquiry, is it not "unjust, unreasonable, and absurd" (7 Wall., 630) to give to these acts, construed together, the design of once taxing this property, within cities, at its full value, and equal to all other property in the territory, and giving to these cities *their full proportion of that tax*, and then to allow the same property, in such cities, to be again taxed by the city under it scharter *at their full value for the same year?* Our reply is, in the language of this court, that such a construction will

be avoided, because "it leads to injustice, oppression, and absurd consequences." (7 Wall., 486.)

Again, the interpretation of these statutes, which we insist is one, which leads to the following additional absurdity:

We have already seen that these acts of November 26th and December 13th expressly take in, to the extent of property valued under the act of December, 13th, the same property, and yet if both acts were designed to stand together and to cover and secure the taxation of property for the *same* year, then we have, under one system, the *same* property valued, assessed, and equalized by one board and set of officers, and the same property valued, assessed, and equalized by another and totally distinct set of officers. Under the city charter the assessments were made by the city assessor (if there be such an officer), and equalized or corrected by the city council, and no reviewing or equalizing board, sitting to correct the injustice or errors of the city assessor and the city council.

This is so regarding any appellate jurisdiction to correct the injustice of the city assessor and city council, because, prior to the act of December 13th, 1879, (as is properly stated in the very able dissenting opinion of Judge PECK, pp. 30 and 31,) the only board of territorial revision was the territorial board of equalization, and its jurisdiction was limited to revising the county assessments of real estate, and, as to that, to equalizing, by adding the aggregate value assessed of a county, so far as it was undervalued, and deducting from the aggregate, so far as it was overvalued.

Such was, under the act of November, 26th, the system of valuing, assessing, and collecting the taxes, if the amended city ordinance, as amended November 26th, 1879, was designed, by the act of December 13th, to remain in force.

Whereas, under the system established by the act of December 13th, its valuation, assessment, and the equalizing of the taxes, which it assessed expressly upon the *same*

property, was totally different in the respects just stated. It established, in the persons of the governor, the treasurer, and the auditor of the territory, what it calls a "territorial board of equalization." It required these officers to "VALUE AND ASSESS" this *same* property for each mile of the road, as such property was returned by the officers of the corporation under oath, (or as disclosed by the information furnished by the auditor in default of return by the railroad officers,) such valuation per mile to be obtained by dividing the entire value of the property in the Territory by the number of miles of line in the entire Territory.

The construction which allows *both* acts to stand, and to operate upon the same property for the same year, results, therefore, in a taxation commanded by the law, and two entirely distinct and independent tribunals, each acting on separate, and exercising distinct judgments regarding value, &c., and the one, therefore, radically and directly repugnant to the other in the particulars just enumerated; and these two assessments made equal, respectively, to the full amount assessed on all other property of the citizens!

A still more glaring repugnance between the two acts is seen by contrasting the plan of valuation of the class of property covered by the act of December 13th.

The methods of the valuation under the acts, respectively, are radically diverse and repugnant. The result of the city's view is, that, for all territorial and *local* purposes, and for all purposes except city purposes, the valuation of railroad property, of the kind in dispute, by the territorial board applies; but for city purposes the old mode of valuation is retained.

As to all such property having fixed location within the city, such as road-bed, superstructures, depots, round houses, &c., the injustice and difficulty of so assessing them locally, by the city, is not, perhaps, so great as when applied to the rolling-stock, having no fixed location. But when the taxation is applied to the rolling-stock, the diffi-

culty and absurdity of allowing each municipality to tax it locally is one of the main causes which induced that Territory, and the States generally, to tax all railroad property which, in its nature, was and is a unit, *as such unit of indivisible property.*

There is, palpably, found in the nature and reason of the subject-matter, as applied to this new species of property, brought into existence by the application of steam to railroad transportation, imperative reasons for treating the great and essential body of such property as a whole, and indivisible. Among these reasons for so treating it as ONE, is that this property is *sui generis*, and is, in fact, used and operated as a whole. Each mile of a line is indispensable to the use and existence of every other mile. The value of each mile is determined by the value of the aggregate of miles of the entire road. No one mile, in the city of Cheyenne or elsewhere, has any value as detached from the residue of the line. If any one mile of the right of way, road-bed, or the like, is sold by the city of Cheyenne for taxes assessed by the city, that destroys the value of the entire line, because it breaks it.

So it is, in a large degree, with all the property described in the act of December 13th as taxable under it. All rolling-stock, personal property, right of way, road-bed, structures on the right of way, and the like, are indispensable to the operation of *every part* of the road, and, in law, they "*pertain*" to it, because essential to the use of the whole.

These parts are, therefore, in their nature inseparable from the whole. It is, we submit to the court, because of this "*oneness*" of the entire body of property, so used for the one common object, that this act of December 13th required them to be valued and assessed as one indivisible thing.

The act of December 13th is based upon the proposition which it embodies, that all property used in the

operation of a railway, wherever located, belongs as much to one part of the road as another, and that justice to the company and the public both require that it should be valued for taxation as an entirety.

To hold, therefore, that this idea of unity and indivisibility, which the act of December 13th attached to the property which it embraced for taxation, was so adopted and put in force in this act, and yet that the same act designed to suffer the totally antagonistic principle of taxation, contained in the city charter, to be continued and remain in force, results not only in the absurdity of attributing to the Legislature the design of the double taxation, for the benefit of cities, of the same property, each of the two double taxes being equal to the tax upon all other property, but also that additional absurdity of putting in force, on the *same* property at the *same* time, the two antagonistic principles of taxation, one treating and making the property taxed an entirety, and indivisible and forbidden, by public policy, to be severed, and the other treating it as capable of being separately and locally assessed and taxed, by sections, out of existence in the respective cities of the territory.

These absurdities, in their results, are well indicated, as stated in the dissenting opinion of Judge PECK, Record, p. 29, where he says:

"There is presented, by this case, the discrepancy between the assessments, the city valuing at $226,900 property which the board (territorial board of equalization) valued at less than $34,255, the difference resulting from a disregard of the principle of equalization, and the appropriation to the city, as the basis of taxation, of more than $192,675 of value which belong to the rest of the line of the road, outside of the city, by the rule of *diffusion*, the rule of unity, and the rule of entirety."

ROLLING-STOCK.

Stated in other words, and in some additional views, we may here, as well as anywhere else, add:

The charter of the city (amended act December 13th, 1877) gives the city power "to levy and collect taxes for general revenue purposes on all real, personal, and mixed property *within the limits of the city*" &c.

Under this power the city, for 1880, valued and assessed to the appellant for taxation, *inter alia*, the following: "*Proportionate value* of rolling-stock in Cheyenne, *as terminus*, $100.000." (Record, p. 3.)

The qualifying words "within the limits of the city" have often been construed, and construed as respects the power of a city to tax the rolling-stock of railways having their principal place of business in a city or running through it.

Dillon's Mun. Corp., 3d edition, secs. 786–790, and notes, refers to many of the cases.

The Union Pacific Railway system of roads is nearly 2,000 miles long, and is situate in Nebraska, Wyoming, Utah, Colorado, and Kansas. It has many locomotives and many cars running daily over the road, and stationary only for repairs and for switching purposes. The Union Pacific proper runs through Wyoming, east and west, touching at Cheyenne. The Denver Pacific, chartered by Colorado, was authorized by Congress (act of March 3d, 1869) to go to Cheyenne, and there connect with the Union Pacific; and, to make this connection, it runs a mile or two within the limits of Wyoming.

Where did the city of Cheyenne get the authority to determine (as its city clerk, acting as assessor, not by virtue of any *statute*, but only by virtue of an *ordinance*) "the *proportionate* value of rolling-stock in Cheyenne, as a terminus?

This assessment or valuation was illegal, for two reasons:

1st. Because, by the new act of December 13th, 1879, the valuation for purposes of taxation of all railroad property proper, including rolling-stock, is to be determined by

the board created by that act, and not by the city assessor.

2d. But if not—if the charter provision is in force, and if the city assessor may value property within the city for taxation—he has no authority to determine the *proportion* of the rolling-stock which ought to pay taxes in the city; and his determination that in 1880 this proportion amounted to $100,000 is of no binding force or validity.

The repugnancy between the two statutes—that of November 26th, and that of December 13th—by what we have gone over, made, as seems to us, utterly plain and irresistible. That allowing the two to "stand together" results in consequences of singular "injustice, oppression, and absurdity," cannot be well denied. But the repugnancy between the two statutes, as intended to operate upon the same property at the same time, does not stop even with what we have noticed.

In what we have said above we have shown that the express letter of the act of December 13th requires *every* mile of the road within the Territory, whether within city limits or not, to be appraised. If it should be deemed necessary to further enforce this view, that every mile within the Territory must be appraised by the board, this can be done and made conclusive by the provision that requires the county commissioners "shall divide and adjust the number of miles and the amounts falling within each precinct, township, and school district in their respective counties, and that such amounts shall be entered and placed on the lists of taxable property returned by the several assessors."

Here is a provision, then, saying that every precinct in the Territory shall *receive its share* of the division. As already remarked, it was conceded in the trial below, as appears by the record, top of page 32, that the word "pre-

cinct" here means, as it stands in the law, "taxing precinct," the same as if the text so read. And this, whether conceded below or not, is plain on the face of the statute.

Hence, therefore, the Legislature does, as we above stated, provide for assigning to each taxing precinct its share of the levy made under the act of December 13th. Hence, therefore, and also it follows, that it taxes the line and the property described in this act, found within every taxing precinct and within every city. The additional repugnancy, therefore, between this act of November 26th, and that of December 13th, is brought out by viewing these necessary consequences, namely, that every taxing precinct in the Territory has the *same* right to make assessments, and to levy taxes, and collect the same, which the city of Cheyenne has. Hence if, prior to the enactment of the 13th of December, any county or city or town or township, in the Territory, could, under law existing prior to December 13th, make assessments and collect taxes on the parts of this property within their respective taxing jurisdictions, then they can, under the construction of appellee, do so *now*, and since the act of December 13th; and each of these has an equal right so to do, with the city of Cheyenne. Such laws, antecedent to December 13th, allowing counties, &c., to assess taxes upon its property, are no more repealed by the act of December 13th, than is the law of November 26th amending the charter of Cheyenne.

Prior to December 13th, 1879, the counties did possess the power to make assessments of taxes upon the property in question. Their assessments were subjected, for equalization, to a territorial board of equalization, &c. (See Record, bottom of page 30 and top of page 31.) It follows from all this that, if the power of Cheyenne to make assessments upon the property covered by the act of December 13th, still continues, then every taxing district, having power to make assessments prior to December 13th, such as the

counties, can still make these assessments equally with Cheyenne; and thus we have the whole line of the railroad within the Territory open to this double assessment.

It seems to us quite unnecessary to pursue this matter of the repugnancy between these two acts further. If further argument upon the subject be, however, required, we commend and adopt, as the true view and exposition of the statutes, the argument found in the dissenting opinion of Judge Peck in this case, as found in the Record from page 29 to page 35, inclusive.

SPECIAL STATUTES—REPEAL OF.

Before leaving the point as to whether the act of December 13th repeals that part of the city charter which taxed the species of property taxed under the act of December 13th, it may be well to notice the contention that such repeal will not be implied in this case because of the rule of interpretation that says: General laws will not be held to repeal special prior ones, and this especially when the special act is a charter of a city or the like.

As applied to the present case, there are many considerations which defeat this view.

One is, that there is no such rule of interpretation as the one which must be insisted on, in the present case, in order to defeat the repeal. The rule, as it actually is, is accurately stated by Judge Cooley on Taxation, p. 255, thus:

"The power to vote local taxes is at all times subject to the legislative modification and control. The general law may modify their powers, even when they are conferred by special charter, if the terms of the general law are sufficiently comprehensive for that purpose."

The author adds that in doubtful cases he would say that the presumption is against the intent to repeal.

Now, apply this rule to the present question of repeal,

and it has been seen, from what we have pointed out, in the provisions of this act of December 13th, even regarding it now, as a general tax law, not only that its provisions "are sufficiently comprehensive for" the purpose of modifying the city charter, as to the taxation of the special property involved in this suit, but much more than "sufficient." It has been seen that it is expressly and literally a "modification" of that charter as to these taxes—seen that the intent to modify, and, to the extent of the species of property in question, to *supersede*, is irresistibly fixed in the face of the act, unless you are to attribute to the Legislature the purpose of keeping in force, at the same time, two antagonistic tax laws, each operating on the *same* property, and, not only taxing it *twice*, but this at full value, and each time to an amount equal to the full tax assessed on all the other people—not only taxing double the amount of all other taxes, but doing this through totally distinct sets of offices, each acting on independent discretions, and each making the valuations, in the two several assessments, on antagonistic modes. And to the conclusion that all this absurdity and injustice was intended, you must arrive by disregarding the express letter of the act of December 13th, which, in its fifth section, (Record, p. 27,) expressly repeals all parts of "*all acts*," whether city charters or not, which are inconsistent with the provisions of this act.

But it is not true, as a matter of fact or of law, that the act of December 13th is a general tax law, or, hence, within any rule as to general laws not being suffered, by implication, to repeal special ones.

On the contrary, this act of December 13th is "special" in the extreme sense of that word. It is an act specially selecting out, from the entire body of the property, one single species—one in its nature and modes of use, *sui generis*, and, therefore, incapable of being assessed or taxed along with other property—a species which, though distributed throughout the country, is yet *one* property, every

part being indispensable to, and, in its use, inseparable from, every other part.

Such is the anomalous character of the subject-matter to be here dealt with by the Legislature, and it was fitly dealt with alone, and by itself, by, and in, a *special* act adapted to such special conditions.

And most evidently the whole act, as well as the very nature of the subject-matter, shows a purpose in the Legislature to, once for all, establish *one* system of taxation for this peculiar property, to wit, all that was a *railroad* extending into several counties, and all that was "appurtenant" thereto.

As to this act of December 13th being a special law, we further refer to and adopt what is said by Peck, J., Record, pp. 33 to 35.

This is not, as we have said, the case of a repeal by mere *implication;* but the new act *expressly* repeals "ALL acts and parts of acts for the assessment [that is, valuation for purposes of taxation] of the property of railroad and telegraph companies and the equalization of assessments, *so far as they provide for the assessment and equalization of the property of said railroad and telegraph companies.*"

This repeal extends in terms to every prior act relating to the assessment—that is, the valuation for the purposes of taxation—of the property of railroads, except their outside and outlying property. Under this act there is but one mode in Wyoming of valuing such property for taxation, and that mode is prescribed and furnished by the act itself.

Is not the mode, of valuing property, adopted by the city in 1880 inconsistent with the mode prescribed by the new act? Clearly. Then that mode is repealed; not by *implication* only, but in *express* terms.

OFFER TO DO EQUITY.

Another point in the case made by the majority, and on which they relied in dismissing the bill, was the failure of the

bill to disclose that they had offered to do equity, the court saying (Record, p. 22) that this failure to offer to do equity was the "omission of a condition precedent to the awarding of any injunction to restrain." This failure to do equity, as explained by the majority, is in this, that, while the bill confesses that there were within the city two and seven-tenths miles, assessable at $9,250 a mile, at eleven and one-half mills on the dollar, yet the bill only tenders this rate of taxation as to three and two-tenths mills, leaving a half mile valued at $4,625, and making a tax of $53.18 not tendered.

Now, there are several complete answers, as we think, to this objection of the court to continuing the injunction.

One reason why this failure to tender or pay the said alleged deficiency of tender of $53.18 is that one stated by the dissenting opinion, (Record, pp. 33–35) The substance of it is that, though the bill admits an obligation to pay, if the tax were legally assessed, under the act of December 13th, on three and seven-tenths miles, valued at $9,250 to the mile, this tax of eleven and one-half mills to the dollar, yet the bill does *not* admit such obligation to pay this, or any other sum, in the *absence* of an actual and existing assessment by the only authority which could make it, to wit, the board acting under the act of December 13th. And as no such assessment or levy existed, therefore, there was, in law and fact, *no* lawful assessment of *any* tax existing which *could* be tendered or paid. And hence there was and *could* be no failure to "do equity" in this alleged failure to pay the $53.18, because neither that nor any other sum was due, or could be required to be paid *before*, and in the absence of, a lawful assessment of the taxes.

The entire assessment was made under a repealed statute, and was absolutely void, and was not good, as an assessment or as creating a lien, for such an amount as the *court* might think, or even as the bill might confess, would be due under a lawful assessment made under the act of De-

cember 13th. The court being unable to make or correct the tax assessments, is palpably without power to deal with this matter of what amount would be due under the act of December 13th. Hence it is true that averments of the payments made, and the amount thereof, in the bill are evidently surplusage, and were resorted to out of a superabundance of caution. The utmost that could, in any view, be required of any one seeking, in equity, to be delivered from assessments, seizures, and alleged liens, which are wholly and absolutely void, because assessed under a repealed law, is to tender and show readiness to pay whatever shall be lawfully assessed whenever lawfully assessed and due.

This the bill, in substance, does, (Record, p. 9,) and then more than does, when it avers actual payment of about all (all but $30.19; see Record, p. 34) which could be claimed if the assessment had been fully made under the act of December 13th.

It is quite true that when a part of the taxes sought to be enjoined are valid and legal, and part not, the court will not enjoin the collection of *all*, including the legal part, without tender of that legal part. But the same authority and the same reason which sustains this rule sustains the one above asserted, namely, that where *none* are legally assessed, and none, therefore, legally due, there the injunction restraining all, so illegally assessed, will not be refused merely because there may, *thereafter*, be justly assessed, for the *same* time, *some* taxes, and upon the same property. If, as in the present case, the bill shows that no part of the taxes are lawful, that all are void, and that none have been yet assessed or due under any existing law, and that therefore the bill cannot possibly set forth and tender the lawful part, as distinguished from the void, there such distinguishing and tender is not required, because a legal impossibility.

These principles are fully recognized and established by

the cases cited in High on Injunction in the notes to section 363.

Fraud in Assessment and Valuation.

The foregoing propositions, we think, completely dispose of this case, and compel a reversal of the decree below. But there is another point which leads to the same result. It is this: Though injunctions restraining collection of taxes assessed under lawful authority will not be granted for irregularities or errors of judgment, in the taxing officers or their methods, yet, when the bill discloses, and a demurrer confesses, that the taxing officers have "been actuated by fraudulent purpose, and, instead of attempting to carry out the law, have wholly disregarded its mandates, and declined to bring their judgment to bear upon the subject submitted to them, and arbitrarily and with intent and purpose to defeat the equity at which the law aims," there the court will relieve by injunction.

This is, in the present case, admitted by the demurrer because this is, in substance, averred in the bill. (Record, p. 5.)

Will this court hold and say to the country, if these averments of the bill are true, that the tax-payer has no remedy?

The authorities are conclusive in favor of the jurisdiction of equity in such cases.

The doctrine above, taken from Judge Cooley's work on Taxation, (p. 157,) is irresistibly enforced and laid down, in the opinion given by that judge in Merrill *v.* Humphrey, 24 Mich., 170–175, where the court holds as follows:

"If the supervisor of a township, in making the assessment of property for taxation, shall fraudulently, and with view to impose upon an individual more than his

just proportion of the public burden of taxation, assess the property of such individual above its value, and relatively above the other assessments on his roll, the party aggrieved may have an injunction to restrain the collection of the excessive tax."

This is precisely what the appellant here alleges. Precisely the same doctrine is laid down in Iron Co. *v.* Town of Hubbard, (29 Wis., 51-58,) in a case of a town tax—this case reaffirming Lefforts *v.* Supervisors, (21 Wis., 688,) and is recognized in Railway Co. *v.* Supervisors, (48 N. Y., 99.)

And in Railway Co. *v.* Nolan, (48 N. Y., 518,) it is distinctly asserted, the court there saying, in speaking of such fraudulent action of tax assessors:

"Their judgment can be reviewed by action for fraud, mistake, or other cause giving jurisdiction to a court of equity."

So, in Wilson *v.* Marsh *et al.*, (34 Vt., 352–359,) the court holds in effect the same doctrine.

Dismissing Bill Erroneous in any Event.

But suppose we are not sustained by the court in the view above presented, that the bill is not defective in failing to offer to do equity by tender of the $53.18, (Record, p. 22,) or rather the $30.19, (Record., p. 34,) and that this tender is not dispensed with, either under the maxim "*de minimis non curat lex*," nor under the rule that, where *no* tax has been lawfully assessed, no tender can be made or is required *prior* to an assessment based on law; and suppose, also, that we are wrong in insisting that an assessment made with fraudulent purpose, without any exercise of judgment and in the absence of all attempts at examining facts or evidence, and in furtherance of hostile purpose to impose an unjust and excessive rate, (Record, p. 5,) may be enjoined, then the decree below is *still* erroneous, and should be reversed, provided the act of December 13th repeals that of November

26th, insofar as it relates to the mode of valuation for taxation of the property in question.

If the assessment was void because based on a repealed law, and because the assessing officers were therefore *wholly* without jurisdiction, then the court ought not, by dismissing the bill and dissolving all injunctions, to have licensed these officers, so totally without jurisdiction, to go forward and, by a void sale, inflict the enormous injury stated in the bill. What the court ought to have ordered, in the supposed case, is, manifestly, that the bill be not dismissed, but the injunction continued, with directions to allow the bill to be amended, the tender of $30.19 made, and the decree below so modified as to correct the alleged error in the tender.

This, in effect, is precisely the principle asserted by Cooley in the above cited case of Merrill *v.* Humphrey, as to the taxes actually and lawfully due. The injunction was continued, subject to such payment being duly tendered or made; this, however, being (unlike the present) in a case where there was no lack, but an abuse, of jurisdiction in making the assessment.

And where it is, by the record, made apparent to this court that the defect in the proceedings below, which makes necessary a modification, or even a reversal of the decree, is owing to a mere mistake, or inadvertence in making the required proof, or the like, which may be supplied, or is owing to some technical defect, there the court will not dismiss the bill *absolutely*, but will remand the case to the court below for the correction of the defect, or to give opportunity therefor.

So it is expressly held by this court in Drummond's Administrators *v.* Magruder, 9 Cr., 125; and this is in harmony with the practice of this court in such cases as—

Crittenden *v.* Brewster, 2 Wall., 191–198.
Garland *v.* Davis, 4 How., 131.
Binney *v.* Canal Co., 8 Pet., 218–219.
Ex-parte Plummer, 8 Wheaton, 380.

There were some other points presented to, and considered by, the court below than those we have now gone over, but we refrain from their consideration, because they are not vital in the case, and especially because we cannot but think those considered are conclusive of the case, and must reverse the judgment below.

And under this head we invite the court's attention to the fact that the bill discloses (Record, p. 6) that the city taxed against complainant the rolling-stock, &c., of the Colorado Central. And it will be observed (Record, p. 23) that, on the appeal in the Supreme Court of the Territory, the city conceded it had no right to do this. And, notwithstanding this fact and this concession, the Supreme Court ordered the bill to be dismissed at complainant's cost; whereas, in the extremest view, and in view of the fact so conceded, by the majority below, the court was bound not to dismiss the bill as it did, but to give relief, at least, as to this subject-matter of the taxation to complainant of the Colorado Central rolling-stock.

JOHN F. DILLON,
SHELLABARGER & WILSON,
For Appellant.

113-376

Supreme Court of the United States.

OCTOBER TERM, 1884.
No. 97.

APPEAL FROM THE SUPREME COURT OF WYOMING.

THE UNION PACIFIC RAILWAY CO., *Appellant,*
vs.
ANDREW RYAN, MARSHALL OF THE CITY OF CHEYENNE, AND THE CITY OF CHEYENNE, *Appellees.*

BRIEF FOR THE APPELLEES

FRANCIS MILLER,
of Counsel.

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BRIEF FOR THE APPELLEES.

Complainant filed bill of complaint in the First District Court to have defendants enjoined from collecting certain taxes for the year 1880, assessed against complainant by the city of Cheyenne and claimed by complainant to be illegal upon the ground that its property should have been assessed for taxation for city purposes by the Territorial Board of Equalization, by virtue of "An Act in Relation to the Assessment of railways and telegraph lines," approved December 13th, 1879, and published in the session laws of 1879, on pages 13 to 15 inclusive.

Defendants filed a demurrer to the bill of complaint, or separate demurrers to two parts of it, and the case came to hearing upon the bill of complaint and demurrer be-

fore Hon. William Ware Peck, associate justice of the supreme court, and a final decree rendered upon such hearing, granting the prayer of the bill and perpetually enjoining defendants from the collection of said taxes and decreeing the same to be void, and from this decree an appeal was taken.

The demurrer was two-fold in its character raising separately the question concerning the taxes upon the property of the Colorado Central Railroad Company (so-called,) and upon the allegations of the bill with reference thereto, which must be considered as admitted by the demurrer; it was conceded in the Supreme Court of Wyoming that the decree was proper as to those particular taxes, and no contest was made as to that part of the bill relating to the taxation of the Colorado Central railroad company property, as regarding it. On consideration of the case by the Supreme Court of Wyoming, the decree below granting the injunction, was reversed and the bill was dismissed without prejudice.

In the consideration of the questions, then, which are before this court, there are but two points involved, viz:

Whether the assessment of complainants' property by the city, in accordance with the ordinances in such cases made and provided, was legal and proper.

And whether, conceding the jurisdiction of the city for that purpose, the assessment was made by the proper officer.

The facts concerning the assessment of complainants' property are so fully set forth in the bill of complaint, found in printed record pages 3 to 18 inclusive, that it is unnecessary to re-state them here.

We, therefore, proceed to discuss the questions involved.

1. The appellant, the city of Cheyenne, claims the

right to assess for the purpose of municipal taxation the property of the complainant situated within its corporate limits, whether it be located upon the company's right of way or not, in the same manner as other property of the city is assessed, by virtue of the provision of its charter, which gives it power to "levy and collect taxes for general revenue purposes not exceeding six mills on the dollar in any one year on all real, personal and mixed property within the limits of said city, taxable under the laws of the territory."

Session Laws, 1877, page 40-41.
Session Laws, 1879, page 20.

And, it is further authorized to levy a bond tax.

Session Laws, 1877, page 46.

And, also a tax for improvement of streets and alleys,&c.

Session Laws, 1877, page 41.
Session Laws, 1879, page 20-21.

And by the charter it is also provided that "the assesssment, levy and collection of all taxes shall be made as may be provided by ordinance."

Session Laws, 1877, page 40 and 41.
Session Laws, 1879, page 20.

And an ordinance of the city provides the manner of making the assessment, making no distinction as to railway property.

Ordinances of the city of Cheyenne, pages 95–99.

The appellant does not pretend that its property is not taxable for municipal purposes, but that the act hereinbefore referred to, relating to the assessment of railways, which was approved December 13th, 1879, governs the mode of assessment as well for municipal as county and territorial taxation.

It will be observed that since the first incorporation of the city of Cheyenne, in 1869, it has always held the power, by virtue of its charter provisions, to assess, levy and collect taxes in manner provided by ordinance, without reference to the manner of assessment, &c., provided for county and territorial taxes; and its power to tax, as well as the mode of procedure, being considered entirely independent of the general revenue acts, which latter acts have had special provisions concerning the assessment of railways, but were never held to apply to municipal corporations having special charters conferring powers to tax, &c.

Compiled Laws, page 179, sec. 14.
Compiled Laws, page 521, sec's. 5 and 6.

It will hardly be disputed that in enacting the charter of Cheyenne in 1877, and the amendment in 1879, the legislature intended (and their language is clear) to grant to the city the power to regulate their own taxation independent of any other or general law concerning the subject. The meaning of the charter and its amendment in this regard is not ambiguous and they can be understood in no other light than giving complete and full authority over its own taxation.

Then it may be assumed as a correct statement that on the 26th day of November, A. D. 1879, the city possessed full power to assess the complainants' property in manner provided by ordinance, and still retains it unless subsequent legislation has relieved it of the same.

II. We reach now the claim of the appellant, viz: That the authority conferred upon the city by the act of November 26th, 1879, and the previous legislation concerning it was lost by the act of December 13th, in relation to the assessment of railways; the appellant con-

struing said act as applying to Cheyenne, and as repealing to that extent, by implication, that portion of the charter upon which appellees rely.

It is submitted that the railway assessment act does not *expressly* repeal the provision of the city charter concerning taxation. The repealing clause of this act refers simply to the territorial and county revenue law.

III. In determining the proper meaning and application of the act of December 13th, the two acts, viz: of November 26th, and December 13th, must be considered as if they constituted parts of one and the same act. It is a well established principle that statutes in *pari materia* passed at the same session of the legislature must be construed together, the same as if they were parts of the same act.

Peyton *v.* Mosely, 3 T. B., Mon. 77.
People *v.* Jackson, 30, Cal, 427.
Smith *v.* People, 47, N. Y., 330.
3, Neb., 312.
Commonwealth *v.* Griffin, 105, Mass., 185.
Commissioners *v.* Cutter, 6, Ind., 354.
Cain *v.* State, 20, Tex., 355.

Taking these two acts together then, we contend that both remain in force, the latter only governing the assessment of railways for county and territorial taxation. As is submitted hereafter, there is nothing in the latter statute repugnent to the former.

In construing a statute, the intention of the legislature is a fit and proper subject of inquiry; that intention is to be collected from the act itself any from other acts *in pari materia* and from the cause or necessity in making the statute.

IV. Repeals by implications are not favored. One

act is held to repeal another by implication, only in cases of very strong repugnancy or irreconcilable inconsistency. Where powers are granted to different persons, if the powers can subsist together, the grant of one is not a withdrawal of the other.

Brown *v.* County Commissioners 21 Pa. St. 37.
Potter's Dwarris on Statutes 155.
McCool *v.* Smith, 1 Black 470.

Can both these statutes stand and remain in force? We think so. Is there such a repugnancy between their provisions that *necessarily* only one (and that the latter) can stand? It seems to us not. Nowhere in the later statute is a city or municipal corporation referred to.

The entire tenor of the act shows that only territorial and county taxation was being considered. It is only when a railway line is located in more than one county, that it receives the benefit of this law, and the county commissioners are the only officers commanded to levy their tax upon the assessment as made under the provisions of this act. But we are not without precedent upon the very question which is presented in this case. Statutes of other States referring to the taxation of railways, and by their terms leaning much more strongly than ours toward an application to cities, have come under the scrutiny of the courts, and without exception, they have been interpreted as inapplicable to municipalities.

Dunleith & Dubuque Bridge Co., *v.* The city of Dubuque, 32 Iowa, 427.
The city of Davenport, *v.* The Mississippi and Missouri railroad Co., (Judge Dillon's opinion) 16 Iowa, 363.
Ottawa, *v.* county, 12 Ills. 339.
Mayor &c. *v.* Mutual Bank, 20 N. Y. 387.

And cases sighted to following point.

V. But in this class of cases another principle has been announced resting upon the principle concerning repeals by implication, viz.: Statutes of a general nature do not repeal by implication charters and special acts passed for the benefit of particular municipalities.

Dillon on Municipal Cor'ps., sec 54.
20 N. Y., 387. *Supra.*
State *v.* Brainin, 3 Zabr., (N. J.) 484 and 529.
State *v.* Clark, 1 Dutch (N. J.) 54.
Baldwin *v.* Murphy, 82 Ill., 485.
Bowen *v.* Lease, 5 Hill, 221.
Lousville *v.* McKean, 18 B. Mon. 9.
Railroad Co. *v.* Alexandria, 17 Gratt, (Va.) 176.
Dunleith & Dubuque Bridge Co. *v.* Dubuque, 32 Iowa, 427.

The act of November 26th is a special act, being part of the charter of a municipality to persons residing in a particular locality. It is legislation having effect only at one place in the whole territory. It gives the municipality certain powers which are to be exercised only within its limited boundaries for its own local purposes. On the other hand, the act of December 13, regulates a certain matter which is made general throughout the territory. It is a good illustration of a general statute. Residents of the city pay taxes to the county and territory for their purposes the same as persons residing in the county outside of the corporate limits, but they also pay taxes to the city for its municipal purposes, whose revenue is entirely independent and distinct from that of the county. The city is a government of itself, and as such totally different from and independent of the county.

Cooley's Const. Lim. 190.

VI. But there is not the slightest repugnancy between the two statutes. The latter act does not refer to municipal corporations by any of its terms. It is, however, claimed, and was so held by the learned justice in the court below, that the word "Precinct" contemplates and embraces cities. Where it is made the duty of the county commissioners to divide and adjust the number of miles and the amounts falling within each precinct, township or school district in their respective counties, and cause such amounts to be entered and placed on the lists of taxable property returned by the several assessors.

(Session Laws 1879, page 14.)

It must be conceded that the terms "township" and "school district" do not comprise cities.

With reference to taxation, the word "precinct" has not an understood significance in Wyoming, and this act is the only place in which it is used in that connection.

If it means anything, it surely refers to a "taxing precinct."

Is Cheyenne a "taxing precinct" in the county as contemplated by this act?

This act was adopted from Nebraska. Of this there can be no possible doubt.

General Statutes of Nebraska, 1873, sec. 17, on pages 900–902 inclusive.

One dissimilarity between the Nebraska law and ours is that in providing for the commissioners to make the adjustment between the several districts, in addition to the words "each precinct, township, school district" in the Nebraska statute is added "or incorporated city or village."

It will thus be noticed that the Nebraska legislature did not consider "precinct" to mean "city," and our legislature omitted the words "incorporated city or village." If they intended to embrace cities within the purview of the act, taking, as they surely did, the statute from Nebraska, why are these terms that would not fail to convey their intention, omitted?

It is plain that this word "precinct" is borrowed from Nebraska. It has no ordinary meaning here respecting the subject of taxation. The contrary is true, however, in Nebraska. In that state, in the absence of this railway law, there are regular taxing precincts. The county is divided into assessing precincts, each having an assessor, and all the assessors make their report to the county, and these assessing precincts are independent of cities, and are solely for the purposes of county and state taxation—and for city taxation each municipality has its own assessors.

See Gen'l. Stat. Neb. 1873 sec. 2, page 353, as to precinct assessors.

See Gen'l. Stat. Neb. 1873, sec. 24, page 904, as to reports of precinct assessors.

(But this last section does not refer to city assessors.

As to city assessments see:

Gen'l Stat. Neb., 1873, sec. 29, page 119.

Sec. 59, page 157.

But this word "precinct" has received a judicial construction by the Nebraska courts. And, it is there held that precinct in their statutes means "no more than the word, as ordinarily understood, imports, viz: territorial divisions or districts created for certain political and administrative purposes, but without the semblance of corporate character."

State *v.* Dodge County, 10 Neb. 20.

It is a principle universally accepted in this country, that as a general rule it is a fair inference that the legislature in adopting a statute of another state which has there been judicially construed, intended to give it the same interpretation it had there received by judical construction.

Dreenman *v.* People, 10 Mich. 169.
State *v.* Macon Co., 41 Mo. 453.
Draper *v.* Emerson, 22 Wis. 147.

This construction of the Nebraska court was after the adoption of the statute by our legislature, so the above rule is perhaps not strictly applicable in this case, but it is apprehended that this court will accept this construction of the Nebraska court as a fit and proper precedent as to the import of this wonderful word "precinct."

It is certainly good authority that the ordinary meaning of the term does not comprise an incorporated power; it does not signify any corporate existence, and we submit that words must be construed in their ordinary and usual meaning.

Sedwick Const. of Stat. and Const. L. 224 *n.*
Potter's Dwarris on Statutes.

And this authority in 10 Neb. is certainly an acceptable precedent as to the import of the word in that state from which we get the term.

But is it not a proper inference that our legislature intended to adopt the Nebraska understanding of the term. We have not now but may, at some time, have assessment precincts.

So it is noticed that in Nebraska, whence our statute is derived, the word "precinct" would not embrace cities

had their statute omitted the words "or incorporated city or village."

In Wyoming we have "election" precincts, but outside of the act of December 13th, 1879, the term "precinct" is not any where in our laws, and never has been used in referring to revenue, assessments or taxation. It gets its entire force of meaning from this act.

Does it mean then in this statue "incorporated cities?" Are they synonomous terms, or does precinct embrace cities?

Suppose the statute used the word "parish," which has no jurisdictional meaning here, but in some places it has. It is in some places a territorial district. Would the court say the word meant "cities?"

Without any regard to the definition or meaning of the word, it is contended by appellees that the reading of the whole act prevents the construction of "precinct" so as to comprise cities. The whole tenor of it showing that it was only intended to refer to county and territorial revenue.

Appellees claim that the proper application of precinct, as used in this act, if it means anything, is to "a taxing precinct in the county which is under the jurisdiction of the county as such for taxing purposes." The only sub-taxing districts we have are school districts, over the taxation of which the county commissioners have jurisdiction.

The city of Cheyenne is located within a school district, which district is assessed by the county assessor in making the county assessment, and by the county assessor acting, however, as assessor for the district in making the separate school district assessment, and he prepares a separate roll for each district.

But the existence of the corporation of the city of

Cheyenne, as a government, is independent of any county or district. The county commissioners have no authority over it as such city. (To illustrate: One man strikes another in one of the streets. The territory may prosecute the man for assault and battery. The city may also punish him for a breach of the peace, a violation of one of its own laws. It is but one act, but it is an offence against each of two different governments). See Cooley's Const. Lim 198, 199, where this is held and wherein it is stated that a municipal law may differ fro the rule in force elsewhere, but of course, only has authority for the purposes of local government. In its capacity of a municipal corporation, the city of Cheyenne has no connection whatever with the county as a juridictional power. It happens to be located within the boundaries of the county, but as a sovereignty it is totally distinct from it.

Again: Worcester and Bouvier define the word "precinct" to be "a territorial division;" as defined by Webster, it is "a minor territorial or jurisdictional division."

Each author uses the term "division," which represents a part of the whole. If a part of anything is taken out by a process of division, it only leaves the remaining parts, but not the whole. If precinct means a division. it is equivalent to saying something is divided into precincts. (To illustrate: Our counties are divided into school districts, one district is bounded by another, and so on, until we have, so to speak, a county made up of school districts.)

See Cooley's Const. Lim.189, where the author, in referring to subdivided states into school districts, towns etc, does not class cities as subdivisions.

But a county is not divided into cities. Looking at

a county and a city as jurisdictional powers, neither is a part or division of the other.

Remembering the rule about repeals by implication, can the court place a forced and unnatural construction upon a word so as to imply a repugnancy between these two acts. Primarily "precinct" certainly does not mean city.

VII. If, however, it is held that this act must be construed as applying to municipal corporations. Then in thus legislating for such corporations, the legislature has exceeded its rights, in other words, if at all applicable to cities, in so far the act is unconstitutional.

The organic act of Wyoming says: "nor shall any unequal discrimination be made in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value."

See 6 organic act. Comp. L. XLI.

Is this provision followed by distributing the value of the stationary property, buildings, etc. that are situated in Cheyenne, all over the territory? Does Cheyenne receive a tax from said property, which is entitled to its protection, in proportion to its value?

Does the organic act mean that, in taxing property in proportion to its value, it is of no consequence where it is taxed. If A has a residence in Laramie county is the organic act satisfied if he pays a tax thereon, in proportion to its value, to Albany county?

It may be that the rolling stock of a raiway has no situs or location, and thus a tax thereon may properly be proportion between counties, cities, etc. This may be true to a certain extent with the railway track, but a building of stone or wood certainly possesses definite

situs or location. It belongs where it is erected. Suppose it is owned by the person who owns a railway track and rolling stock, does this fact alter its situs? We think not, and that it is a violation of the organic act not only, but of every principle of taxation and of justice, to proportion it for taxation among jurisdictions in which it is not situated.

Furthermore, it is an unequal discrimination in taxing different kinds of property, all of which are bound to receive equal protection and advantage from the city.

VIII. It is urged that the assessor acted without authority. As to his right to sign as assessor, see:

Lessee, etc., *v.* Freman Coates, 10 Ohio, 278.

But the charter gives the council right to assess, levy and collect taxes in manner as may be provided by ordinance, and they possess all incidental powers, viz: to appoint some person to make the assessment. The clerk, by ordinance, is made *ex-officio* assessor. And we submit that the assessor was legally acting as such.

He was in any event a *de facto* officer, and his acts cannot be collaterally attacked. *De facto* tax officers are particularly favored in this regard.

Cooley on Taxation, 185-186.
State *v.* Carroll, 39 Conn., 449-471.
Commonwealth *v.* McCombs, 56 Pa. St., 436.
Dean *v.* Gleason, 16 Wis., 1.
Cocke *v.* Halsey, et als., 16 Pet., 71.
Brown *v.* Lunt, 37 Me., 423.
Smith *v.* Messer, 17 N. H., 420.
Lessee, etc. *v.* Coates, 10 Ohio, 278.

Even in case of fraud the amount due should have been paid as a condition precedent to an injunction,

and even on the theory of the appellant and its own theory of its liability to assessment it has not paid or offered to pay when the bill was brought, what was due on $4,625. at 11½ mills, the city rate, to wit, $53.18. This is due by complainant's own showing and should have been paid as preliminary to an injunction *even in case of fraud.*

See Bigelow on Fraud and High on Injunction.

It is then submitted on behalf of the appellees: That the charter right of the city of Cheyenne to assess for taxation is not repealed nor modified by the act regulating the assessment of railways. That the assessment for 1880 was legally and properly made, and by the proper officer.

C. N. POTTER,
Attorney for Appellees.

Supplemental Brief for the Appellees.

The complainant in the original bill and appellant here, filed a bill of complaint in the First District Court of Wyoming, to have the defendants enjoined from collecting certain taxes for the year 1880, assessed against it by the city of Cheyenne and alleged to be illegal, on the ground, amongst others, that the said property should have been assessed for taxation for city purposes by the Territorial Board of Equalization, provided for by the act of the Territorial Legislature, approved Dec. 13, 1879.

Separate demurrers were filed to two parts of the bill and in the District Court the demurrers were overruled and the injunction prayed for was granted, from which an appeal was taken to the Supreme Court of Wyoming. In that court it was admitted, on the part of the city, that the decree of the District Court was correct in so

far as it related to the taxes on certain property belonging to the Colorado Central railroad company, which had been improperly assessed to the complainant, and that part of the case is not here to be considered. In the appellate court the decree of the District Court was reversed and the case was dismissed, from which the railroad company appealed to this court.

The grounds of equitable relief claimed by the appellant are thus correctly stated in the opinion of the Supreme Court of Wyoming:

"First. It claims there was no lawful assessment of that portion of the complainant's property constituting its road-bed, right of way, superstructure, structures thereon, rolling stock, telegraph line, furniture and fixtures, and personal property belonging to the appellee, who was the complainant below, the assessment being made by the city assessor, while it is claimed that it should have been made by the Territorial assessment board, under the act approved December 12th, 1879, of the Territorial Legislature of Wyoming, entitled, 'An act in relation to the assessment of railways and telegraph lines.'

Second. That in any event the so called city assessor had no authority to make said assessment, no such officer as city assessor having been provided for by the charter of said city.

Third. That the assessment of the complainant's property upon which the tax claimed was levied was grossly unfair, unjust, and unequal, and was fraudulently made, with a fraudulent purpose and intent to make the complainant pay an unjust and undue proportion of the taxes collected in said city, all of which was done with a feeling of prejudice and hostility to the complainant."

These will be considered in their order.

I.

Had the city of Cheyenne the right to assess, for the purpose of municipal taxation, the property of the appellant situated within its corporate limits, in the same manner as other property therein was assessed, according to the provisions of its charter, or were these provisions repealed by the act of the Legislature of Wyoming, above referred to?

The charter gives the city power "to levy and collect taxes for general revenue purposes, upon all real, personal and mixed property within the limits of said city, taxable under the laws of the Territory," and it further provides that "the assessment, levy and collection of all taxes shall be made as may be provided by ordinance."

See Sessions Laws, 1879, p. 30.

This was an act to amend the charter of the city of Cheyenne, and was approved November 26th, 1879.

The city is further authorized to levy a tax to pay the interest on its own bonds.

Sessions Laws of 1877, p. 46.

And a tax for the improvement of streets and alleys &c.

Sessions Laws of 1877, p. 41.
" " " 1879, p. 30-1.

Under these laws the taxes complained of were levied, and no question is raised as to the legality of the tax or its rate, except as to the method of assessment.

On the 13th of December, 1879, the legislature passed the act before referred to "in relation to the assessments of railways and telegraph lines."

Sessions Laws of 1879, p. 13.

The effect of this act is thus stated by the Supreme Court of Wyoming:

"An inspection of the sixth chapter of the laws of Wyoming, passed at its sixth Legislative Assembly, on page 13 of those laws, shows that the Governor, the territorial treasurer, and auditor, are made a board of equalization, evidently for the purposes of having uniformity in the assessment and taxation of railroad and telegraph lines within the several organized counties, and for county and territorial purposes only, and that act in nowise worked or intended to work a repeal of the character of the city of Cheyenne, which was granted by the Legislature in 1877. That act shows what the board was to do. That act prescribes what the president, secretary, superintendent or other principal accounting officers should do. It speaks of the duty of the assessor of the county or district, evidently meaning the district in the county in which machine or repair shops or other buildings should be. It prescribes when it shall be done. It specifies that the territorial auditor shall certify to the county clerks of the several counties in which the property of the corporation or any part thereof may be situated, the assessment so made of the property of such corporation, specifying the number of miles and amount in each of said counties, and then the county commissioners are directed to divide and adjust the number of miles within each precinct, township, or school district in their respective counties; and then it goes on to give the county commissioners power to levy the requisite tax, all of which shows that the act was intended to effect the county organizations and not particular municipalities or municipal corporations. The county commissioners have no control over the cities. It may happen, and does happen, that the county commissioners are not citizens of the

corporations. It could happen that every one of the county commissioners might be a citizen outside of the jurisdictional limits of Cheyenne, and while it would be in the power of the General Assembly of Wyoming, by an express statute, to confer the government of the municipality of Cheyenne upon anybody that it saw fit, yet with a granted charter before it, this court cannot presume that county commissioners are clothed with any power or authority over the city of Cheyenne from that act. The only thing that gives color or can be construed or suggested as giving the authority, is the use for the first time in this Territory in a taxing act of the word "precinct," and this, it is seriously claimed, may mean an organized municipal corporation. Now, "precinct," according to Webster, means a "district within certain boundaries," and in Massachusetts, by old laws, it had reference to the non-acceptance by the collector of the parish or *precinct*, and authorized the parish to proceed to a new choice."

"Bouvier says: "In old times it related to the district for which a high or petty constable is appointed in England," and with this use of the word in modern acceptation, it has been argued before the court that it may mean, and is intended to embrace and include, a repeal of the power of the city of Cheyenne to levy and assess taxes as given to it by its charter, and to cast that burden on a board made up as before stated. We do not think that such is the meaning, nor do we think any elaborate argument is necessary in stating it. If it be contended that the word township can be so construed as to mean an incorporated city we answer, first, that no such ground was taken in argument at bar; and, second, that township has a well-defined meaning, *cide* Abbott's

Law Dictionary, viz: A township is a subdivision of a county for county purposes, more highly organized than a village, and less so than an incorporated city. The term township, in cases there cited, shows it never means an incorporated city. Of course, there can be no pretense that Cheyenne of itself is a school district of Laramie county in any sense.

"The whole act from the first to the sixth section has reference to the uniformity of assessments and taxation for territorial and county purposes, and has no reference in our view to city purposes."

Record, pp. 19-20.

It is not contended on this part of the appellant that the property referred to is not liable to municipal taxation, but it is claimed that the act last referred repealed the charter of the city so far as the assessment of the property of the railroad is concerned and compelled the city to accept the assessment of that property made by the Territorial Board of Equalization.

As to this we say:

a. The railway assessment act does not *expressly* repeal the provisions of the charter of the city concerning the assessment of property and the levying of taxes thereon. The repealing clause simply refers to the territorial and county revenue law. It is as follows:

"Section 5. All acts and parts of acts providing for the assessment of the property of railroad and telegraph companies, and the equalization of assessment, inconsistent with the provisions of this act, are hereby repealed *so far as they provide for the assessment and equalization of the property of said railroad and telegraph companies.*" That the act does not refer to municipal taxation, is apparent from the examination of its details hereto-

fore cited from the opinion of the Supreme Court of Wyoming. The whole act is evidently a special act in reference to a specific and limited subject, and the repealing clause only provides for the repeal of the acts upon the same specific and limited subject, which are inconsistent with the act itself. Other acts are repealed only "so far as they provide for the assessment and equalization of said railroad and telegraph companies," and it would be a very forced and strained construction that would make this repealing clause extend to and include all general taxing laws, and especially such as relate to municipal taxation, where the circumstances are so different, and the reason of the law is entirely absent

b. The act amending the charter of Cheyenne and the one providing for the Territorial Board were passed at the same session of the legislature, and must be construed together, as parts of the same act.

Peyton *v.* Mosely, 3 T. B. Monroe, 77.
People *v.* Jackson, 30 Cal. 427.
Smith *v.* People, 47 N. Y. 330.
Commissioners *v.* Cullen, 6 Ind. 354.
McCartee *v.* Orphan Asylum, 9 Cow. 437.
Dodge *v.* Gridley, 10 Ohio 173.
State *v.* Rackley, 2 Blackf. 249.
McMahen *v.* C. & C. S. L. R. R., 5 Ind. 413.
U. S. *v.* Freeman, 3 Howard 556.

If this be true then if any fair interpretation consistent with the validity of each of the two acts can be given, effect must be given to each of them. Here it is obvious that it only needs the very reasonable construction, that the general acts was intended to apply to general taxation for the territory and the counties, and the special act was local and confined entirely to the muni-

cipal taxation of the city of Cheyenne, to make the two acts wholly consistent with each other. Any other construction would impute to the legislature the folly of solemnly passing an act and at the same session repealing it, or *constructively* passing an act whose different sections were destructive of each other.

c. The construction above contended for has been adopted by the courts in cases relating to the taxation of railroads, where the statutes were much more adverse to the rights of the municipality than that of Wyoming, which is now under consideration.

Dunleith &. Dubuque Bridge Co. *v.* Dubuque, 32 Iowa, 427.

Davenport *v.* M. & M. R. R. Co., 16 Iowa, 365–7, (Judge Dillon's opinion.)

Ottawa *v.* County, 12 Ill., 339.

Mayor &c. *v.* Mutual Bank, 20 N. Y., 387.

d. Moreover the general principal is well established that statutes of a general nature do not repeal, by implication charters and special acts passed for the benefit of particular municipalities.

Dillon in Municipal Corporations, Sec. 54, second edition.

Mayor of Troy *v.* Mutual Bank, 20 N. Y., 387.

State *v.* Braimin, 3 Zab. 484.

State *v.* Clark, 1 Dutch, 54

Railroad Co. *v.* Alexandria, 17 Grat. 176.

Dunleith & Dubuque Bridge Co. *v.* Dubuque, 32 Iowa, 427.

P. W. & B. R. R. Co. *v.* Bayliss, 2 Gill 355.

Mayor &c. *v.* Root, 8 Md. 95.

Ottawa *v.* LaSalle, 12 Ill., 339.

These authorities are in entire harmony with the opinion of the court in the case above referred to in 20 N. Y., 387, cited with approval by the Supreme Court of Wyoming, expressed in the following language: "the system of taxation for municipal purposes is distinct and independent of that for county and state purposes."

f. It is evident from what has been before said that unless these two acts are directly repugnant to each other the charter of the city will remain unchanged by the passage of the later act. But there is no such repugnancy. The argument that the use of the word "precinct" in the act establishing the Territorial Board of Equalization is intended to embrace cities within the scope of that act, is fully met by the Supreme Court of Wyoming in the citation heretofore given. It may be added however, that there is no such thing as a taxing precinct known to the laws of Wyoming, and indeed so far as appears the word is only used in the Statutes of that Territory in this single case. The word is used in some of the States as the equivalent of a voting district and in the District of Columbia as a police division under the charge of a lieutenant of police, but these are mere *territorial designations* and they have no corporate character whatever. The language of this law is borrowed from the legislation of Nebraska, in which State there are taxing precincts, but these precincts are without semblance of corporate character."

State *v.* Dodge Co., 10 Neb. 20.

Moreover the word "precinct" is always used to designate the division of the whole of a territory into simular divisions. Part of a county only is not divided into election precincts, and a municipality does not establish police precincts which do not cover the whole of its ju-

risdiction. In the same way, if there are any taxing precincts in Wyoming they must include the whole area of the territory. And this is the true etymological signification of the word. We cannot imagine such a word used in relation to the two or three or half a dozen cities that lie within its limits, whose boundaries do not in any way touch each other.

g. But if the assessment provided for by the act establishing the Territorial Board of Equalization is intended to apply to the city of Cheyenne, it is in violation of the fundamental principle of all taxation, to-wit: uniformity and equality of burdens. "*Whatever is the basis of taxation, the requirement that it shall be uniform is* UNIVERSAL."

Cooley's Const. Lim., p. 499 *et seq.*

This principle is incorporated in the organic act of Wyoming, in the following language: "The legislative assembly shall not pass any law impairing the rights of private property, nor make any discrimination in taxing different kinds of property; but all property subject to taxation shall be taxed in proportion to its value. R. S. U. S., § 1925.

The "universal" requirement and the Statute that gave being to the territory, alike prohibit inequality of taxation within its limits. Under the act referred to, if its scope extends only to territorial and county taxes, and the proceeds of the taxation are distributed among the various subdivisions as therein provided, all property bears its proportional share of the general burden.

But if that act is held to refer to municipal taxation, gross inequality would result. Thus under the claim of the appellant, which is in accordance with the act, it would be required to pay taxes on an assessment of

3 7-10 miles of road bed at the rate of $9,250 per mile, or on $34,225.

The assessment of its property made by the city set forth in the bill (R. p. 3.) is as follows:

4 miles of main track at $8,000	$32,000.
4 " side " $4,500	18,000.
1 Round House	25,000.
1 Railroad Hotel	10,000.
1 Passenger Depot	12,000.
1 Freight "	12,000.
6 Dwelling Houses	3,000.
1 Express Office	1,000.
1 Wood and Water Depot	2,000.
1 mile of road to military depot	4,500.
Proportionate share of rolling Stock in Cheyenne as terminus	100,000.
Telegraph poles	1,000.
1 Freight Depot	1,200.
1 Passenger "	800.
Frame Building	200.
½ mile of main track	2,500.
Rolling stock	10,000.
Total.	$235,200.

On page 5 of the record the appellant, in his bill, says:

"And your orator further alleges that the valuations placed upon your orator's said property by the aforesaid proceedings of the said Jno. K. Jeffrey pretending to act as assessor as aforesaid, and the said city council *are exorbitant and unfair in the following particulars, to wit:* That the road bed of your orators' railroad is assessed at $8,000 per mile, whereas, as your orator alleges, that the assessable value of the same, if valued in proportion with other property in Cheyenne, would not be more than $6,000 per mile, as your orator believes; that the side tracks of your orator are assessed at $5,500 per mile, whereas, your orator alleges that the assessable value thereof, if valued and assessed in proportion with other

property in the city of Cheyenne, would not be more than $2,000 per mile; that the said round-house is assessed at $25,000, whereas your orator alleges that the same is not worth more than $15,000, and can now be built, and could be built when said assessment proceedings were had and taken, new, for $15,000; that your orators is assessed $100,000 for rolling-stock in Cheyenne, whereas your orator alleges that the proportional value of your orator's rolling-stock belonging within or justly apportionable to that part of your orator's railroads in Cheyenne city, aforesaid, is much less than the value thereof as assessed as aforesaid "

Having thus undertaken to specify the "particulars" of the "exorbitant and unfair" assessments, the correctness of all the items not specified must be taken as admitted. The alleged overcharges then are as follows:

4 mile of roadbed, overcharge of $2,000 per mile	$8,000.
4 " side track " 3,500	14,000.
Round house overcharges	10,000.
Total.	$32,000.

The proportionate value of the rolling stock assessed at $100,000 is alleged to be "much less than the value thereof as assessed." This very indifinite allegation is of no value whatever in pleading, but for the sake of the argument we will assume that the over valuation is one half; say $50,000. This added to the $32,000 above would make, as claimed, an over valuation of $82,000. This deducted from the assessment of $235,200 would leave *the admitted value* of the property of the appellant *liable to taxation* $153,200, or more than *four times* the amount on which it is contended tax should be paid. That is to say this railroad claims that it ought to pay to the city for the benefits it derives from its municipal gov-

ernment only one fourth as much as other property owners are compelled to pay. So monstrous an injustice and such a palpable violation of the organic law of the territory cannot be imputed to the legislature unless its language will admit of no other possible interpretation. But as has already been shown, it would be a forced and strained construction of the language of the statute to adopt the views of the appellant, and therefore no such impeachment of the integrity or intelligence of the legislature is necessary.

But even if no other interpretation of the Statute than that contended for by the appellant was possible, and the court should hold that the language was so intended, it would still be compelled to adjudge the Statute void because of its repugnancy to the universal principle of taxation, equality and uniformity, and because it would be directly in the teeth of the prohibitions of the organic act of the territory.

The language of a learned court on a similar subject is very applicable to this case. "The cities of the State through which railroads pass and in which they terminate have imposed upon them the burden of providing for the protection of the railroad property. Expenditures of money are necessary in the exercise of police jurisdiction to insure the protection thus imposed as a duty on these municipalities. It is not at all reasonable that the legislature intended to take from the city all power" (or any portion of its power) "to raise revenue from this very property, the protection of which is duly charged on them, and to require that the expenses incidental to the discharge of this duty should be paid in the way of tax, by holders of other property. Such unjust legislation discriminating in favor of one class to

the oppression of another, could never have been intended by the legislature."

Duleith & Dubuque Bridge Co. *v.* Dubuque, 32 Iowa, 431.

II.

Had the city assessor power to make the assessment?

In the opinion of the court (R. p. 21.) the following language is used:

"This brings us to the second proposition, to wit: Did the city of Cheyenne assess the property as it had the right to do? Inasmuch as the complainant alleges that the board of equalization for the city acted fraudulently, it is not within our power to say (inasmuch as the demurrer admits all that the complainant states) that the tax has been regularly assessed; but in so far as the question is raised as to the right of the city assessor to make said assessment, no such officer as city assessor having been provided for by the charter of said city, we answer that by the tenth section of the act of incorporation of the city of Cheyenne, passed December 14th, 177, Laws of the 5th Legislative Assembly beginning page 37, the city is provided among other officers with a clerk; and by section thirty it is enacted that the duties, powers and privileges of all the officers connected with the city government not herein defined shall be defined by ordinance of the city council; and by an ordinance of said city as enacted February 4th, 1879 (of which this court takes judicial cognizance), the published ordinances in printed form being before it, *vide* 30th subdivision, 20th section, act to incorporate the city of Cheyenne, approved Dec. 14th, 1877, page 46, Act 5th Legislative Assembly, the city clerk is made *ex-officio* city assessor; and this not only follows the law of the

territory, but follows decision of the Mayor, etc., of Hoboken *v.* Harrison, Harp, and Walker in the 30 New Jersey, 1 Broom. It is the power of the council by ordinance to direct the mode and manner of the assessment and collection of the taxes. Hence it results that where a power is given to a council to levy and collect taxes, and no officer is provided in a charter, as a necessary consequence that the right to levy and collect taxes would carry with it the power and authority to employ the necessary machinery for that purpose.

"Having ascertained this much, we find the pretended city assessor, as the complainant describes him, had the authority to make the assessment complained of."

But in addition to this, the amendment to the charter, Sessions laws of 1879, p. 30, provides expressly that "the *assessment*, levy and collection of taxes shall be made as provided by ordinance." This is direct authority to the common council of the city to designate the officer who should make the assessment, which authority they duly exercised in making the city clerk *ex-officio* the assessor.

III.

As to the charge that the assessments were grossly unfair, and fraudulently made with intent to cause the railroad to pay an undue and excessive tax.

This point is thus disposed of by the court below.

Rec. pp. 21-23.

"The third allegation of the complainant's bill, that the assessment of the complainant's property, upon which the tax claimed was levied, was grossly unfair, unjust and unequal, etc., being admitted by the demurrer, we cannot do more here now than to lay down this proposition, which is sanctioned and sustained by all the decisions; that before the complainant can have or ought to have

any standing in a court of equity to make such an assertion, the complainant should pay what is due. This is laid down in Heine *v.* The Levee Commissioners, 19 Wallace, 655; by the Alabama Gould Life Insurance Company *v.* Lott, tax collector, 54 Alabama, 499; in the 24 Michigan, in Merrill *v.* Humphrey, 170; in the 83 Ill., The Pacific Hotel Company *v.* Liel *et al.*, 602; 2 Otto, 575, State railroad tax cases."

"Now, the complainant alleges in its bill of complaint that it tendered what was due, to wit, the sum of $363,40. Now, even if the territorial board had authority to make the assessment for the city of Cheyenne, of the property of the U. P. Ry. Co., in and within the city of Cheyenne, for city purposes, by the complainant's own bill this was insufficient, and was not the amount due. Complainant admits in its complaint that it owns within the city two and two-tenths miles; that it owns a branch road of one mile, making three and two-tenths; and it owns the property of the Denver Pacific Railroad half a mile, which makes three and seven-tenths miles: Whereas, in its summary in the concluding part of its bill, in which it puts the amount that it is justly assessable with under its theory of the law at $29,600 (besides its real estate valued at $2,000 by its statement) which is the assessment of three and two-tenths miles and not for three and seven tenths miles as it admits in the opening part of its complaint. So that even upon its own theory of the law, and its own theory of its liability to assessment, it had not paid or offered to pay, when this bill was brought, what was due, by the tax on $4,625, (which) at eleven and a half miles, the city rate would be $53.18, and by the complainant's own showing this amount was then due and payable, and should have been paid as a condition precedent to an

injunction; and if the city clerk acting as city assessor, had the right to assess the complainant's property subjected to the authority of the council to correct and equalize said assessments, of course a larger amount would be due and owing as by complainant's own statements is shown in its allegations as to over assessments; and this sum should be paid as a condition precedent to the awarding of any injunction to restrain whatever may be illegal and fraudulent as in the complainant's bill is alleged."

The admitted value of the property liable to taxation under this city assessment is as has been before shown $153,206, the tax on which at eleven and a half cents per $100, would be $1761.80. Giving credit for the money paid by the railroad, $363.40, there would still be due the sum of $1398.40. In accordance with the principle laid down by this court in the State Railroad cases *supra*, "that no injunction can be granted to stay the collection of taxes until it is shown that all the taxes *conceded to be due* or which the *court can see ought to be paid* * * have been paid or tendered," it is evident that there was no error in the action of the court below.

See High on Injunctions, § 497,498,551.
Merrill *v.* Humphrey, 24 Mich. 170.

The Supreme Court of Wyoming in their opinion proceed thus: "But the complainant alleges that the city council, acting as a board of equalization, unlawfully, wrongfully and fraudulently did pretend to correct and equalize the said assessment as returned to it by the said Jno. K. Jeffrey, so that the same as equalized and corrected by the said city council was as follows: 2 miles of main track, roadbed, &c., $8,000, per mile—$16,000; 6

miles of side track $5,500, per mile—$33,000; leaving all other items of said assessment to stand as returned by Jno. K. Jeffrey; and they corrected and equalized the property formerly belonging to the Denver Pacific Railway and Telegraph company, so the passenger depot was assessed at $600; the rolling stock, proportional value in Cheyenne terminus, $17,000; leaving all other items of the assessment as made by J. K. Jeffrey. Now upon an inspection it will be seen that Jeffrey, as assessor, had put down four miles of main track at $8,000 and four miles of side track at $4,500. The full assessment of the eight miles by Jeffrey's assessment was $50,000; as equalized and returned by the council it was $49,000. The complainant claims that the counsel acted unlawfully, wrongfully and fraudulently, and yet makes no such allegation as to Jeffrey; and if the complainant's allegations are true, and for all the purposes of this consideration, standing upon a demurrer, it must be so considered it will be seen that the city council absolutely reduced the assessment one thousand dollars on these eight miles, so that the assessment, as unlawful, wrongful, and fradulent, as plaintiffs' claim to have been corrected and equalized by the city council, was absolutely reduced $1,000 on the Denver Pacific. The wood passenger depot was put down at $800 by Jeffrey, and reduced to $600 by the city council, whereas the rolling stock, proportional value, in Cheyenne, was put down by Jeffrey at $10,000, and by the council raised to $17,000, an excess of $7,000, so that, putting one against the other, it will be seen that the increase by the council over Jeffrey's assessment was the sum of $5,800. Now, as the complaint alleges that this was done unlawfully, wrongfully, and fraudulent, and was made as it is conceded that there was no authority to assess the property

of the Colorado Central to the Union Pacific Railway Company, and as the demurrer for all purposes of this case so admits, yet as the bill on its face shows that the complainant has not paid the taxes fairly conceded or shown to be due, to entitle it to be heard in a court of equity, and as it may have a case upon a proper bill for relief in equity, whilst this bill in our opinion will have to be dismissed and the injunction awarded will have to be annulled and set aside, yet in doing so the court will, following the Supreme Court of Michigan in Merrill *v.* Humphrey, 24 Mich., 170, while ordering the decree of the court below to be reversed and the injunction to be dissolved, but the bill to be dismissed without prejudice the appellants to have their costs in both courts.

This view of the case is applicable and conclusive even if there is in the bill any sufficient allegation of fraud in the making of the assessment. But this we deny. There is no statement of the fact from which the court can infer the existence of any fraud in the action of the municipal authorities. True there are statements in regard to excessive valuations, but there is no allegation what evidence, or whether any evidence, offered to the assessor or to the council to instruct them as to the value of the property, or to show that they acted, not with want of judgment, but *mala fide*.

In reviewing the action of taxing officers upon bills to enjoin the collection of taxes, courts of equity are inclined to indulge presumptions in favor of the regularity and validity of the conduct of public officers until the contrary be shown. They will therefore, not act upon mere general averments that assessments were too high, and that testimony was produced before the taxing board to show that fact, *but all the facts should be affirmatively shown* in the bill. So, where fraud on the part of the officers is

relied on as ground for equitable relief the facts constituting the fraud should be set forth, and not mere general allegations of fraudulent conduct.

High on Injunctions, §490.

But the complainant does not allege that it offered any evidence to inform the assessor or the council, or that they refused to consider his evidence, or that he was in any way prevented from presenting his case to the municipal authorities. The fair legal presumption, therefore is that he did not attempt to inform them, and that if they erred at all in the assessment it was an honest error of judgment, which no court will undertake to review.

See also High on Injunctions §21.
Strong's Eq. Pl. §251.

If the bill of the complainant is not such as will permit him to maintain it on the ground of fraud, it is evident he can not be heard at all. The statute gives him his right of appeal from the action of the city assessor to the common council, and when such remedy is given the party claiming to be injured must pursue that remedy and cannot ask further aid of a court of equity.

High on Injunctions §493.
Cooley on Taxation p. 528.

The action of the Supreme Court of Wyoming was eminently discreet and considerate. Instead of dismissing the bill absolutely, as it might well have done, it simply dismissed it without prejudice, thus offering the complainant an opportunity of filing a new bill in which the apparent defects of the original could have been remedied, if they were remediable. Of this opportunity the

complainant refused to avail itself, and therefore it is justly liable to the strictest adverse construction of the case presented by it here.

On the whole case therefore the appellee confidently claims that there is no error in the ruling of the Supreme Court of Wyoming, and that the decree below, dismissing the bill, should be affirmed with costs.

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